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Part II

# Environmental Protection Agency

**40 CFR Parts 52 and 97**

**Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport; Proposed Rule**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 52 and 97**

**[FRL–6170–6]**

**RIN 2060–AH88**

## Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of proposed rulemaking (NPR).

**SUMMARY:** In accordance with section 126 of the Clean Air Act (CAA), EPA is proposing action on petitions filed by eight Northeastern States seeking to mitigate what they describe as significant transport of one of the main precursors of ground-level ozone, nitrogen oxides ($NO_X$), across State boundaries. Each petition specifically requests that EPA make a finding that $NO_X$ emissions from certain stationary sources emit in violation of the CAA's prohibition on emissions that significantly contribute to ozone nonattainment problems in the petitioning State. If EPA makes such a finding of significant contribution, EPA is authorized to establish Federal emissions limits for the sources. The eight Northeastern States that filed petitions are Connecticut, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont.

This notice proposes to find that portions of certain petitions are technically meritorious under the test applicable under section 126. The EPA is proposing that the technically meritorious portions of the petitions be deemed granted or denied at certain later dates pending certain actions by the States and EPA regarding State submittals in response to the final $NO_X$ State implementation plan call ($NO_X$ SIP call). This notice describes the schedule and conditions under which applicable final findings on the petitions would be automatically triggered. Further, this notice proposes the control requirements that would apply to sources in the source categories for which a final finding is ultimately granted. This notice also proposes to deny certain petitions, in whole or in part. The EPA published a shorter proposal on the section 126 petitions on September 30, 1998 that announced the availability of this longer proposal in the docket and on EPA's Website, announced the public hearing, and requested comment on the proposal.

The transport of ozone and its precursors is important because ozone, which is a primary harmful component of urban smog, has long been recognized, in both clinical and epidemiological research, to affect public health. There is a wide range of ozone-induced health effects, including decreased lung function (primarily in children active outdoors), increased respiratory symptoms (particularly in highly sensitive individuals), increased hospital admissions and emergency room visits for respiratory causes (among children and adults with pre-existing respiratory disease such as asthma), increased inflammation of the lung, and possible long-term damage to the lungs.

**DATES:** Comments may be submitted until November 30, 1998, as previously announced in a shorter notice of proposed rulemaking published in the **Federal Register** on September 30, 1998.

Comments must be postmarked by the last day of the comment period and sent directly to the Docket Office listed in **ADDRESSES** (in duplicate form if possible). The public hearings for the section 126 and FIP proposals will be held on October 28 and 29, 1998, as previously announced in a shorter notice of proposed rulemaking published in the **Federal Register** on September 30, 1998.

**ADDRESSES:** Comments may be submitted to the Air and Radiation Docket and Information Center (6102), Attention: Docket No. A–97–43, U.S. Environmental Protection Agency, 401 M Street SW, room M–1500, Washington, DC 20460, telephone (202) 260–7548. Comments and data may also be submitted electronically by following the instructions under **SUPPLEMENTARY INFORMATION** of this document. No confidential business information (CBI) should be submitted through e-mail. For comments that include color graphics, a courtesy copy of comments to Carla Oldham would be appreciated at Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, MD–15, Research Triangle Park, NC 27711, telephone (919) 541–3347, fax (919) 541–0824, e-mail address oldham.carla@epa.gov. The address for sending overnight packages is U.S. EPA, Air Quality Strategies and Standards Division, 411 W Chapel Hill St., Durham, NC 27701.

The public hearing will be held at the EPA Auditorium, 401 St., SW., Washington, DC.

Documents relevant to this action are available for inspection at the Docket Office, at the above address, between 8 a.m. and 4 p.m., Monday though Friday, excluding legal holidays. A reasonable copying fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT:** General questions concerning today's action should be addressed to Carla Oldham, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, MD–15, Research Triangle Park, NC, 27711, telephone (919) 541–3347. Please refer to **SUPPLEMENTARY INFORMATION** below for a list of contacts for specific subjects described in today's action.

**SUPPLEMENTARY INFORMATION:**

### Availability of Related Information

The official record for this rulemaking, as well as the public version, has been established under docket number A–97–43 (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located at the address in **ADDRESSES** at the beginning of this document. Electronic comments can be sent directly to EPA at: A-and-R-Docket@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect in 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by the docket number A–97–43. Electronic comments on this NPR rule may be filed online at many Federal Depository Libraries.

The EPA has issued a separate rule on $NO_X$ transport entitled, ''Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone'' (see notices included in the docket for this rulemaking). The rulemaking docket for that rule, hereafter referred to as the $NO_X$ State implementation plan (SIP) call ($NO_X$ SIP call), contains information and analyses that are relied upon in today's proposal on the section 126 petitions. Therefore, EPA is incorporating by reference the entire $NO_X$ SIP call record for purposes of the section 126 rulemaking. Documents related to the $NO_X$ SIP call rulemaking are available for inspection in Docket No. A–96-56 at the address and times

given above. In addition, the proposed $NO_X$ SIP call and associated documents are located at http://www.epa.gov/ttn/oarpg/otagsip.html. The EPA is finalizing action on the $NO_X$ SIP call concurrently with today's proposal on the section 126 petitions.

Additional information relevant to this NPR concerning the Ozone Transport Assessment Group (OTAG) is available on the Agency's Office of Air Quality Planning and Standards' (OAQPS) Technology Transfer Network (TTN) via the web at http://www.epa.gov/ttn/. If assistance is needed in accessing the system, call the help desk at (919) 541–5384 in Research Triangle Park, NC. Documents related to OTAG can be downloaded directly from OTAG's webpage at http://www.epa.gov/ttn/otag. The OTAG's technical data are located at http://www.iceis.mcnc.org/OTAGDC.

## For Additional Information

For additional information related to air quality analysis, please contact Carey Jang, Office of Air Quality Planning and Standards; Emissions, Monitoring, and Analysis Division, MD–14, Research Triangle Park, NC 27711, telephone (919) 541–5638. For legal questions, please contact Howard Hoffman, Office of General Counsel, 401 M Street SW, Mc-2344, Washington, DC, 20460, telephone (202) 260–5892. For questions regarding the $NO_X$ cap-and-trade program, please contact Melanie Dean, Office of Atmospheric Programs, Acid Rain Division, MC–6204J, 401 M Street SW, Washington, DC 20460, telephone (202) 564–9189. For questions regarding regulatory cost analyses for electricity generating sources, please contact Ravi Srivastava, Office of Atmospheric Programs, Acid Rain Division, MC–6204J, 401 M Street SW, Washington, DC 20460, telephone (202) 564–9093. For questions regarding regulatory cost analyses for other stationary sources, please contact Scott Mathias, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, MD–15, Research Triangle Park, NC 27711, telephone (919) 541–5310.

### Outline



## I. Background

### *A. Summary of Rulemaking*

In today's action, EPA is proposing to make a technical determination that certain major stationary sources and source categories identified in the section 126 petitions are significantly contributing to nonattainment in, or interfering with maintenance by, one or more petitioning State with respect to one or more of the national ambient air quality standards for ozone (hereafter

referred to as a positive or affirmative technical determination). On the basis of that proposed affirmative technical determination, EPA is proposing that the petitions naming these sources and source categories be granted or denied at certain later dates pending certain actions by the States and EPA regarding State submittals in response to the final $NO_X$ SIP call. The schedule and conditions under which the applicable final findings on the petitions would be triggered are discussed below in Section II.F. The EPA's analysis of significant contribution is discussed in Section II below.

Under the 1-hour ozone standard, EPA is proposing to make affirmative technical determinations as to a subset of sources and source categories named in the petitions from Connecticut, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, and Rhode Island. The source categories for which EPA is proposing this affirmative technical determination of significant contribution are discussed in Section II. The existing sources that are affected by this technical determination are listed in appendix A to proposed part 97.

The EPA is also proposing to partially deny the petitions from Connecticut, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, and Rhode Island because EPA believes some of the sources or source categories named in the petitions are not significantly contributing to nonattainment in the relevant petitioning State with respect to the 1-hour ozone standard. The EPA is proposing to deny the Vermont petition in full with respect to the 1-hour ozone standard because the 1-hour standard no longer applies in that State (See 63 FR 31014).

Three of the petitioners, Massachusetts, Pennsylvania, and Vermont, also directed their petitions at the new 8-hour ozone standard. Under the 8-hour ozone standard, EPA is proposing to make a positive technical determination as to a subset of sources named in the petitions from Massachusetts and Pennsylvania. The source categories for which EPA is proposing this affirmative technical determination of significant contribution are discussed in Section II. The existing sources that are affected by this technical determination are listed in appendix A to proposed part 97. The EPA is proposing to deny the Vermont petition in full with respect to the 8-hour ozone standard because Vermont has no current 8-hour ozone nonattainment problems and no future projected nonattainment problems based on available analyses.

In aggregate for all petitions and both ozone standards, the sources and source categories that EPA is proposing to find significantly contribute to nonattainment in, or interfere with maintenance by, (hereafter simply contribute significantly to) one or more of the petitioning States are located in the following States: Alabama, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, and West Virginia. The combined list of existing sources affected by a positive technical determination with respect to at least one petition, along with proposed emissions limitations in the form of tradable allowance allocations, is located in Appendix A to proposed part 97. The EPA intends to update the list of affected sources on a periodic basis to include new sources in the source categories that are significantly contributing.

Some of the sources that EPA is proposing do not significantly contribute to the petitioning States may be located in States that are affected by a separate rulemaking on $NO_X$ transport, the $NO_X$ SIP call. While emissions from sources in certain States may not be significantly contributing to nonattainment or maintenance problems in any of the eight petitioning States, the sources may be significantly contributing to nonattainment problems in other downwind States. In acting on these section 126 petitions, EPA can only consider the impacts on downwind nonattainment problems in the petitioning States, which are all located in the Northeast. In the $NO_X$ SIP call, EPA considered impacts on nonattainment problems throughout the eastern half of the United States. Therefore, a determination that sources in certain States are not significantly contributing for purposes of this action on the section 126 petitions should not be assumed to reflect EPA's conclusions on significant contribution with regard to the $NO_X$ SIP call or other transport-related rulemakings.

The section 126 petitions varied with regard to the control requirements they recommend for mitigating the interstate transport. While EPA considered the recommendations, section 126 does not limit EPA to the recommended controls in determining an appropriate remedy. In Section III, EPA proposes the emissions limitations that would be necessary to ensure that the affected sources do not or would not emit in violation of the applicable statutory prohibition on significant contribution by upwind States to downwind air quality problems. The control remedy is based on the uniform application of highly cost-effective controls (as determined based on cost per ton of $NO_X$ reduced for each type of source). In selecting the control measures, EPA considered the recommendations made by OTAG on July 8, 1997 and the analyses for the $NO_X$ SIP call. The EPA considered controls that would effectively minimize emissions while not exceeding a source-categorywide $2000 per ton for reductions of ozone season $NO_X$ (in 1990 dollars), on average, for each source category. For electricity generating units larger than 25 MWe, EPA is proposing a control level corresponding to 0.15 lb/mmBtu. For industrial boilers and turbines greater that 250 mmBtu/hr, EPA is proposing a control level corresponding to a 60 percent reduction from an uncontrolled baseline. For small sources and process heaters, EPA is proposing no additional controls. For purposes of this rulemaking, EPA is defining small sources as: (1) Electricity generating boilers and turbines serving a generator 25 MWe or less, and (2) other indirect heat exchangers with a heat input of 250 mmBtu/hr or less. The control requirements are consistent with the assumptions used in developing the final budgets for the $NO_X$ SIP call. Further discussion concerning small point sources can be found in Section II of this preamble.

The EPA intends to implement the control requirements through a Federal $NO_X$ cap-and-trade program, which is described in Section III. The EPA believes a trading program is the most cost-effective approach for achieving emissions reductions from large stationary sources. The proposed trading program is consistent with the model trading rule that EPA is finalizing for purposes of the $NO_X$ SIP call, except for changes necessary to account for Federal implementation instead of State implementation. The EPA envisions that there would be a common trading program among section 126 sources and $NO_X$ SIP call sources in States that choose to participate in the State trading program, and sources subject to a Federal implementation plan under the $NO_X$ SIP call.

In accordance with section 126, sources must comply with the control requirements no later than 3 years from a final positive finding on the petitions, on a schedule to be determined by the EPA Administrator. The EPA is proposing that the full 3 years is necessary for compliance. As discussed below, EPA is proposing that the technically meritorious portions of the

petitions be deemed granted or denied at certain later dates, pending certain actions by States and EPA regarding implementation plans required in response to the $NO_X$ SIP call. The EPA intends to take final action by April 30, 1999 on the technical determination described above, the decision as to when each portion of the petitions would be deemed granted or denied, and the emissions limitations that would apply to any sources for which a petition is ultimately deemed granted.

*B. Ozone Transport, Ozone Transport Commission $NO_X$ Memorandum of Understanding (OTC $NO_X$ MOU), OTAG, the $NO_X$ SIP Call, the Revised Ozone National Ambient Air Quality Standard (NAAQS), and Ozone Effects*

Today's action occurs against a background of a major national effort, spanning at least the last 10 years, to analyze and take steps to mitigate the problem of the transport of ozone and its precursors across State boundaries. This effort has grown more intensive in the past several years with the approval of the OTC $NO_X$ MOU by 11 of the Northeastern States and the District of Columbia included in the Northeast Ozone Transport Region (OTR), the completion of the OTAG process (described below), and the publication of EPA's proposed $NO_X$ SIP call. In addition, on July 18, 1997, EPA issued a revised NAAQS for ozone, for which is determined over an 8-hour period (the 8-hour standard) (62 FR 38856). In establishing the 8-hour standard, EPA is setting the standard at 0.08 parts per million and defines the new standard as a ''concentration-based'' form, specifically the 3-year average of the annual 4th-highest daily maximum 8-hour ozone concentrations. This has resulted in more areas and larger areas with monitoring data indicating nonattainment. Thus, it is even more important to implement regional control strategies to mitigate interstate pollution in order to assist downwind areas in achieving attainment. This new 8-hour standard must now be taken into account, along with the pre-existing 1-hour standard, in resolving transport issues. These issues and events are detailed in the proposed $NO_X$ SIP call (62 FR 60318) and familiarity with that notice is assumed for purposes of today's notice. In addition, in many areas of the country, the 1-hour standard has been revoked because the areas are attaining that standard (63 FR 31013; June 5, 1998 and 63 FR 39432, July 22, 1998). A State may petition under section 126 for the both the 1-hour standard, to the extent that it still applies in the petitioning State, and the 8-hour standard.

The 1990 CAA set forth many requirements to address nonattainment of the 1-hour ozone NAAQS. Many States have found it difficult to demonstrate attainment of the NAAQS due to the widespread transport of ozone and its precursors. The Environmental Council of the States (ECOS) recommended formation of a national work group to allow for a thoughtful assessment and development of consensus solutions to the problem. This work group, OTAG, was established 3 years ago to undertake an assessment of the regional transport problem in the eastern half of the United States. The OTAG was a collaborative process conducted by representatives from the affected States, EPA, and interested members of the public, including environmental groups and industry, to evaluate the ozone transport problem and develop solutions. The OTAG region included the 37 eastern-most States and the District of Columbia. Through the OTAG process, the States concluded that widespread $NO_X$ reductions are needed in order to enable areas to attain and maintain the ozone NAAQS. Based on information generated by OTAG and other available data, EPA determined that certain States in the OTAG region were significantly contributing to nonattainment problems in downwind States. Therefore, EPA issued a proposed $NO_X$ SIP call requiring the States to revise their SIPs to include $NO_X$ control measures to mitigate the ozone transport. The EPA is finalizing the $NO_X$ SIP call in the same timeframe as this proposal on the section 126 petitions.

The EPA's response to the section 126 petitions differs from EPA's action in the $NO_X$ SIP call rulemaking in several ways. In the $NO_X$ SIP call, where EPA concludes that $NO_X$ emissions from a State are significantly contributing to nonattainment problems in downwind States, EPA will require the State to submit SIP provisions to prohibit an amount of $NO_X$ emissions which represents the significant contribution. The State will have the discretion to select the mix of controls measures for their sources to meet the required statewide $NO_X$ reduction reductions. If the State does not make the required SIP submission, EPA is required to promulgate a Federal implementation plan (FIP) within 2 years of the State failure. In the November 7, 1997 $NO_X$ SIP call proposal, EPA announced that it intended to expedite the FIP promulgation in order to assure that the downwind States receive the air quality benefits of regional $NO_X$ reductions as soon as practicable. Therefore, the EPA is proposing FIPs for all the States affected by the $NO_X$ SIP call in conjunction with EPA's issuance of the final $NO_X$ SIP call.

By comparison, section 126 petitions are limited to addressing emissions from upwind stationary sources and not other sectors of the inventory. If EPA grants the petitions, it is EPA, not the States, that promulgates control requirements for the sources. The control remedy for sources in the section 126 petitions that EPA is proposing in this action is consistent with the control assumptions EPA used for these sources in determining reductions projected to meet the final statewide $NO_X$ budgets for States subject to the $NO_X$ SIP call.

Because the $NO_X$ SIP call process overlaps considerably with the section 126 petition process, in that they both address $NO_X$ transport in the eastern United States, EPA believes it is important to coordinate the two actions as much as possible. As discussed below, EPA and the petitioning States developed a proposed consent decree on the rulemaking schedule for the petitions that takes into consideration the $NO_X$ SIP call rulemaking.

All of the States that submitted section 126 petitions are included in the OTR and participated in the OTAG process. In addition, all of the upwind sources identified in the petitions are located in the OTAG region. All eight petitions rely, in part, on the OTAG analyses for technical justification. The OTAG process concluded in June 1997 prior to the promulgation of the new 8-hour ozone standard and, therefore, the OTAG analyses focused on the 1-hour standard. All the petitions request relief under the 1-hour standard. Three of the petitions also request relief under the new 8-hour standard. In acting on the section 126 petitions, EPA believes that it can only consider 8-hour nonattainment problems for the petitioning States that expressly requested relief under that standard. Under the $NO_X$ SIP call, EPA considered both 1-hour and 8-hour nonattainment problems throughout the OTAG region.

Ground-level ozone, the main harmful ingredient in smog, is produced in complex chemical reactions when its precursors, volatile organic compounds (VOCs) and $NO_X$, react in the presence of sunlight. The chemical reactions that create ozone take place while the pollutants are being blown through the air by the wind, which means that ozone can be more severe many miles away from the source of emissions than it is at the source.

At ground level, ozone can cause a variety of ill effects to human health, crops and trees. Specifically, ground-level ozone induces the following health effects:

- Decreased lung function, primarily in children active outdoors,
- Increased respiratory symptoms, particularly in highly sensitive individuals,
- Hospital admissions and emergency room visits for respiratory causes, among children and adults with pre-existing respiratory disease such as asthma,
- Inflammation of the lung,
- Possible long-term damage to the lungs.

The new 8-hour primary ambient air quality standard will provide increased protection to the public from these health effects.

Each year, ground-level ozone above background is also responsible for several hundred million dollars worth of agricultural crop yield loss. It is estimated that full compliance of the newly promulgated ozone NAAQS will result in about $500 million of prevented crop yield loss. Ozone also causes noticeable foliar damage in many crops, trees, and ornamental plants (i.e., grass, flowers, shrubs, and trees) and causes reduced growth in plants. Studies indicate that current ambient levels of ozone are responsible for damage to forests and ecosystems (including habitat for native animal species).

*C. Section 126*

Subsection (a) of section 126 requires, among other things, that SIPs require major proposed new (or modified) stationary sources to notify nearby States for which the air pollution levels may be affected by the fact that such sources have been permitted to commence construction. Subsection (b) provides:

> Any State or political subdivision may petition the Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(D)(ii) * * * or this section.

Subsection (c) of section 126 states that—

> [I]t shall be a violation of this section and the applicable implementation plan in such State [in which the source is located or intends to locate]—
>
> (1) For any major proposed new (or modified) source with respect to which a finding has been made under subsection (b) of this section to be constructed or to operate in violation of the prohibition of section 110(a)(2)(D)(ii) * * * or this section, or
>
> (2) For any major existing source to operate more than three months after such finding has been made with respect to it.

However, subsection (c) further provides that EPA may permit the continued operation of such major existing sources beyond the 3-month period, if such sources comply with EPA-promulgated emissions limits within 3 years of the date of the finding.

Section 110(a)(2)(D) provides the requirement that a SIP contain adequate provisions—

> (i) Prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—
>
> (I) Contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to [any] national * * * ambient air quality standard, or
>
> (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility.
>
> (ii) Insuring compliance with the applicable requirements of sections 126 and 115 (relating to interstate and international pollution abatement) * * *

As explained in detail in Section II.A., below, it is EPA's view that, with respect to existing stationary sources, sections 126(b)–(c) and 110(a)(2)(D), read together, authorize a downwind State to petition EPA for a finding that major stationary sources or groups of sources upwind of the State emit in violation of the prohibition of section 110(a)(2)(D)(i) because, among other reasons, their emissions contribute significantly to nonattainment, or interfere with maintenance, of a NAAQS in the State. If EPA grants the requested finding, the existing sources must shut down in 3 months unless EPA directly regulates the sources by establishing emissions limitations and a compliance period extending beyond 3 months but no later than 3 years from the finding. In accordance with section 302(j) of the CAA, the term major stationary source means ''any stationary facility or source which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant. * * *'' For the purpose of this rulemaking the relevant pollutant is $NO_X$ emissions.

The EPA acknowledges that others have urged different readings of sections 126(b)–(c) and 110(a)(2)(D) and EPA solicits comments thereon in this rulemaking, as described in Section II.A.1., below.

*D. Summary of Section 126 Petitions*

The petitions vary as to the type and geographic location of the source categories identified as significant contributors. All the petitions identified source categories; some petitions also provided lists of sources within the specified categories. The source categories include electric generating plants, fossil fuel-fired boilers and other indirect heat exchangers, and certain other related stationary sources that emit $NO_X$. All the petitions target sources in the Midwest; some also target sources in the South and Northeast. The geographic area covered by each petition is shown in Figure 2. The EPA requests comment from the petitioning States as to whether EPA has correctly interpreted the geographic scope of their petitions.

The petitions also vary as to the level of controls they recommend be applied to the sources to mitigate the transport problem. Several recommend EPA establish a 0.15 lb/mmBtu $NO_X$ emission limitation and several recommend that controls be implemented through a cap-and-trade program. The petitions are described in greater detail below.

All of the petitions rely, in part, on OTAG analyses for technical support. In addition, the States submitted a variety of other technical analyses which include computerized urban airshed modeling, wind trajectory analyses, results of a transport study by the Northeast States for Coordinated Air Use Management, and culpability analyses.

Table I–1 shows, by petitioner, the named source categories, the named geographic areas, and the requested remedy sought by the petitioning States. The named source categories are worded as they appear in the petitions. A map of the OTAG Subregions is provided in part 52, appendix F, Figure 1.

TABLE I–1.—EPA'S SUMMARY OF SECTION 126 PETITIONS

| State | Named source categories | Named States | Requested remedy |
|---|---|---|---|
| CT ..... | Fossil fuel-fired boilers or other indirect heat exchangers with a maximum gross heat input rate of 250 mmBtu/hr or greater and electric utility generating facilities with a rated output of 15 MW or greater. | Sources in OTAG Subregions 2, 6, and 7 and portion of OTR extending west and south of CT. Includes all or parts of IN, KY, MI, NC, OH, TN, VA, WV. And OTR States DC, DE, MD, NJ, NY, PA. | Establish, at a minimum, emission limitations and a schedule of compliance consistent with the OTC $NO_X$ MOU, and a cap-and-trade program. Does not request remedy for OTR States because of OTC $NO_X$ MOU. |
| ME ..... | Electric utilities and steam-generating units with a heat input capacity of 250 mmBtu/hr or greater. | Sources within 600 miles of Maine's ozone nonattainmen t areas. Includes all or parts of NC, OH, VA, WV, and OTR States CT, DE, DC, MD, MA, NJ, NY, NH, PA, RI, VT. | Establish compliance schedule and emissions limitation of 0.15 lb/mmBtu for electric utilities and the OTC $NO_X$ MOU level of control for steam generating units, in a multi-state cap-and-trade $NO_X$ market system. |
| MA ..... | Electricity generating plants. ..... | Sources in region within 3 counties on either side of the Ohio River in IN, KY, OH, WV. | Establish emissions limitation of 0.15 lb/mmBtu or 1.5 lb/MWh and a compliance schedule. |
| NH ..... | Fossil fuel-fired indirect heat exchange combustion units and fossil fuel-fired electric generating facilities which emit ten tons of $NO_X$ or more per day. | Sources in OTR States and OTAG Subregions 1 through 7. Includes all or parts of IL, IN, IA, KY, MI, MO, NC, OH, TN, VA, WV, WI. Also OTR States CT, DE, DC, MD, MA, ME, NJ, NY, PA, RI, VT. | Establish compliance schedule and emission limitations no less stringent than: (a) Phase III OTC $NO_X$ MOU reductions; and/or (b) 85% reductions from projected 2007 baseline; and/or (c) An emission rate of 0.15 lb/mmBtu. |
| NY ..... | Fossil fuel-fired boilers or indirect heat exchangers with a maximum heat input rate of 250 mmBtu/hr or greater and electric utility generating facilities with a rated output of 15 MW or greater. | Sources in OTAG Subregions 2 6, and 7 and portion of OTR extending west and south of NY. Includes all or parts of IN, KY, MI, NC, OH, TN, VA, WV. And OTR States DC, DE, MD, NJ, PA. | Establish, at a minimum, emission limitations and a schedule of compliance consistent with the OTC $NO_X$ MOU, and a cap-and-trade program. Does not request remedy for OTR States because of OTC $NO_X$ MOU. |
| PA ..... | Fossil fuel-fired indirect heat exchange combustion units with a maximum rated heat input capacity of 250 mmBtu/hr or greater, and fossil fuel-fired electric generating facilities rated at 15 MW or greater. | AL, AR, GA, IL, IN, IA, KY, LA, MI, MN, MS, MO, NC, OH, SC, TN, VA, WV, WI. | Establish emission limitations and a compliance schedule for a cap-and-trade program requiring: (a) seasonal reductions of the less stringent of 55% from 1990 baseline levels, or 0.20 lb/mmBtu, beginning by May 1999; (b) if necessary, seasonal reductions of the less stringent of 75% from 1990 baseline levels, or 0.15 lb/mmBtu, beginning by May 2003; (c) such additional reductions as necessary beginning in 2005. |
| RI ..... | Electricity generating plants ..... | Sources in region within 3 counties on either side of Ohio River in IN, KY, OH, WV. | Establish emissions limitation of 0.15 lb/mmBtu or 1.5 lb/MWh and a compliance schedule. |
| VT ..... | Fossil fuel-fired electric utility generating facilities with a maximum gross heat input rate of 250 mmBtu/hr or greater and potentially other unidentified major sources. | Sources located within a geographic area extending 1000 miles southwest from Bennington, VT. Includes all or parts of IL, IN, KY, MI, NC, OH, TN, VA, WV. Also AL GA, IA, MO, SC, WI. Also OTR States CT, DE, DC, MD, MA, NJ, NY, PA. | Establish emissions limitation of 0.15 lb/mmBtu or 1.5 lb/MWh and a compliance schedule. Does not request remedy for OTR States because of OTC $NO_X$ MOU. |

1. Control Remedies Recommended by Petitions

The petitions vary regarding the remedy requested. Several of these petitions reference the OTC $NO_X$ MOU, with regard to control levels, affected sources, or compliance deadlines. All of the petitioning States were signatories on the OTC $NO_X$ MOU. The OTC $NO_X$ MOU commits these States (and the 4 other signatory parties—New Jersey, Maryland, Delaware, and the District of Columbia) to reductions in ozone season $NO_X$ emissions from large utility and industrial combustion sources through implementation of a phased-in regionwide cap-and-trade program. Specifically, affected sources in the OTR are fossil fuel-fired boilers and other indirect heat exchangers with a maximum rated heat input capacity of 250 mmBtu/hr or greater, and electric generating facilities with a rated output of 15 megawatts (MW) or greater.

The OTC $NO_X$ MOU established emissions reduction requirements for these sources in the OTR, creating emissions budgets for 1999 (Phase II) and 2003 (Phase III). (Phase I required the installation of reasonably available control technology (RACT) by May 1995.) The requirements vary across three control zones in the region: an inner zone ranging from the District of Columbia metropolitan area northeast to southeastern New Hampshire (covering all contiguous moderate and above nonattainment areas), an outer zone ranging out from the inner zone to western Pennsylvania, and a northern zone which includes much of northern New York and northern New England (including most of New Hampshire).

For Phase II of the OTC $NO_X$ MOU, which begins in 1999, sources in the inner zone are subject to emissions reduction requirements based on the less stringent of an emission rate of 0.20 pounds $NO_X$ per million British thermal units of heat input (lb/mmBtu), or a 65 percent reduction from 1990 $NO_X$ levels; sources in the outer zone are subject to emissions reduction requirements based on the less stringent of a 0.20 lb/mmBtu rate, or a 55 percent reduction from 1990 $NO_X$ levels; and

sources in the northern zone must adopt RACT. The Phase III requirements, which may be altered by a ''mid-course correction'' based on new information such as refined air quality modeling, establish emissions reduction requirements based on the lesser of a 0.15 lb/mmBtu rate, or a 75 percent reduction from 1990 levels for sources in both the inner and outer zones. Northern zone sources would face emissions reduction requirements based on the lesser of a 0.20 lb/mmBtu rate, or a 55 percent reduction from 1990 levels. In both Phase II and III in all three zones, electric generating facilities less than 250 mmBtu/hr but above 15 MW are subject only to a capping of emissions at 1990 levels for purposes of budget calculation. However, individual States determine specific allocations for each source from their overall budget based on independent allocation formulas, and thus the allocation for these sources will not necessarily reflect this level.

Though all of the petitions request that EPA impose controls in terms of various emissions limitations, four of the eight petitions—New York, Connecticut, Pennsylvania, and Maine—also request that a trading program with a cap, or emissions budget, be established to implement these controls. Massachusetts, Rhode Island, and Vermont request that limitations be established for all named sources at 0.15 lb/mmBtu, which is the level of control for electric generating facilities used to calculate the budget in the proposed $NO_X$ SIP call. Maine requests an emission limitation of 0.15 lb/mmBtu for named electric utilities, but the OTC $NO_X$ MOU level of control for named steam generating units. New Hampshire requests emission limitations no less stringent than the Phase III OTC $NO_X$ MOU reductions, and/or 85 percent reductions from the projected 2007 baseline, and/or an emission rate of 0.15 lb/mmBtu. New York, Connecticut and Pennsylvania all request that emissions limitations consistent with the OTC $NO_X$ MOU be imposed on named sources, but Pennsylvania and Connecticut specify the outer zone requirements; New York does not specify a zone. The level of reduction requested for 2003 in these three petitions specifying basic OTC $NO_X$ MOU requirements appears to be less stringent than that in the petitions requesting 0.15 lb/mmBtu, since the remedy requested would allow sources the option to implement the less stringent of a percentage reduction or an emission rate. In terms of smaller sources named by these three States, Pennsylvania's petition appears to seek somewhat more reductions than the OTC $NO_X$ MOU by requiring the same emission level for electric generating facilities less than 250 mmBtu/hr and greater than 15MW as for larger units. Both Connecticut and New York appear to be aligned with the OTC $NO_X$ MOU in seeking only a capping of emissions at 1990 levels for these smaller sources.

New York, Connecticut and Pennsylvania recommend a date for the implementation by sources of control requirements: the OTC $NO_X$ MOU schedule of compliance, including its phased-in controls and implementation dates of 1999 and 2003. The remaining States request that EPA establish a schedule of compliance requiring sources to comply with emission limitations as expeditiously as practicable.

2. Sources Covered by Petitions

The petitions vary somewhat regarding the universe of sources they name as significant contributors to their ozone problem. Three of the petitioning States—New York, Connecticut, and Pennsylvania—name the same universe of sources covered by the OTC $NO_X$ MOU. New Hampshire names fossil fuel-fired indirect heat exchangers and electric generating facilities as well, but uses a tonnage applicability cut-off to include only sources that emit ten tons or more of $NO_X$ per day. Massachusetts and Rhode Island name ''electricity generating plants'' as the universe requiring controls, without naming a specific size cutoff. Finally, Vermont names fossil fuel-fired electric generating facilities of 250 mmBtu or greater.

All of the section 126 petitions, except Pennsylvania's, Massachusetts' and Rhode Island's, named some States in the OTR as significant contributors. However, only New Hampshire and Maine requested relief beyond OTC $NO_X$ MOU requirements from sources in the OTR. The geographic scope of each petition is discussed in Section II.

Section 126 allows States to petition EPA for a finding against sources and groups of sources that ''emit'' or ''would emit'' pollution that significantly contributes to nonattainment problems in the petitioning State. Thus, a finding could potentially apply not only to existing sources within a particular source category, but also to sources that would be built in the future. The EPA believes the current section 126 petitions are ambiguous as to whether the requested findings are intended to encompass new sources.

All of the petitions describe the requested finding as against source categories that ''are emitting'' significantly contributing levels of $NO_X$. This suggests that perhaps the petitions are only intended to address existing sources. In addition, four petitions (Massachusetts, New Hampshire, New York, and Rhode Island) provide lists of sources in the targeted source categories and do not indicate that future sources should be added. However, it is notable that, in defining the universe of covered sources, all of the petitions identified specific source categories rather than just identifying specific sources. If emissions from the existing sources in the named source categories are of concern to the petitioning States, then it follows that emissions from new sources of the same type would also be of concern because they would increase the amount of emissions emitted by the category as a whole.

The recommended control remedies in the petitions may provide the best insight into whether the petitions are to cover new sources. As discussed above, all of the petitioning States are signatories on the OTC $NO_X$ MOU. The OTC $NO_X$ MOU outlines a cap-and-trade control program designed to reduce $NO_X$ transport from certain groups of stationary sources in the OTR that are generally the same types of sources as covered by the petitions. The OTC $NO_X$ MOU program does include controls on both existing and new sources. The Connecticut, New Hampshire, New York, and Pennsylvania petitions all request the section 126 control remedy to be consistent with the OTC $NO_X$ MOU. Maine also requests that a control remedy be implemented through a cap-and-trade program. Further, five of the eight petitions request that EPA make a section 126 finding against sources in other OTR States, in addition to sources outside the OTR. It does not seem reasonable that any of the petitioning States would determine that both existing and new sources should be controlled for transport purposes within the OTR through the OTC $NO_X$ MOU, while recommending that outside the OTR only existing sources of the same type would need to be controlled for transport.

Based on the above information, EPA is proposing to interpret all eight section 126 petitions to cover both existing and new sources. Therefore, if any final findings are triggered for source categories in a particular geographic area, new sources in those source categories locating in that area would also be subject to the section 126 control remedy. If any of the petitioning States disagrees with this interpretation as to its petition, EPA requests that the State

submit clarifying comments on this issue.

*E. Litigation on Rulemaking Schedule*

Section 126(b) requires EPA to make the requested finding, or deny the petition, within 60 days of receipt. It also requires EPA to provide a public hearing for the petition. In addition, EPA's action under section 126 is subject to the procedural requirements of section 307(d) of the CAA. One of these requirements is notice-and-comment rulemaking. Section 307(d) provides for a time extension, under certain circumstances, for rulemakings subject to that provision. Specifically, it allows statutory deadlines that require promulgation in less than 6 months from proposal to be extended to not more than 6 months from proposal to afford the public and the Agency adequate opportunity to carry out the purposes of section 307(d). In three notices dated October 22, 1997 (62 FR 55769), November 20, 1997 (62 FR 6194), and January 2, 1998 (63 FR 26), EPA ultimately extended the deadline for its requirement to take action on the eight petitions to December 18, 1997.

On February 25, 1998, the eight petitioning States filed a complaint in the U.S. District Court for the Southern District of New York to compel EPA to take action on the States' section 126 petitions. *State of Connecticut* v. *Browner,* No. 98–1376. The EPA and the eight States filed a proposed consent decree that would establish a schedule for EPA to act on the petitions. Pursuant to CAA section 113(g), the EPA solicited comments on the proposed consent decree, by notice dated March 5, 1998 (63 FR 10874). The comment period closed April 6, 1998. On August 21, 1998, after considering the comments received in the section 113(g) process, EPA requested the Court to enter a slightly modified version of the consent decree. Pending the Court's action on that request, EPA is continuing to follow the schedule in the proposed consent decree.

The schedule recommended in the proposed consent decree would require EPA to take final action on at least the technical merits of the petitions by April 30, 1999. The recommendation would further permit EPA to structure the final action it would take by April 30, 1999 so as to defer the granting or denial of the petitions to certain later dates extending to as late as May 1, 2000. The section 126 rulemaking schedule is described in more detail in Section II.A.2. of this notice.

*F. Advance Notice of Proposed Rulemaking on Petitions*

In accordance with the schedule in the proposed consent decree, on April 30, 1998, EPA published in the **Federal Register** (63 FR 24058) an advance notice of proposed rulemaking (ANPR) on the section 126 petitions. The ANPR provided EPA's preliminary identification of source categories named in the petitions that significantly contribute to nonattainment problems in the petitioning States, provided EPA's preliminary assessment of the types of recommended emissions limitations and compliance schedules, provided EPA's preliminary assessment of the remedy the Agency would propose for approvable petitions, discussed legal and policy issues raised under section 126, and outlined the rulemaking schedule for the petitions. The ANPR solicited comment on all of the issues and preliminary assessments. The EPA received approximately 50 comments on the ANPR from industry, States, and environmental groups. These comments covered the full spectrum of issues discussed in the ANPR and were carefully considered in the development of today's proposal. The EPA appreciates the efforts by the commenters to provide early, thoughtful input on this rulemaking. The EPA will respond to the ANPR comments, if any response is appropriate, when EPA responds to comments on this proposal. After reading this proposal, if any commenters on the ANPR believe their comments are still relevant, there is no need to resubmit the comments in full. Instead, commenters may simply submit a letter requesting that EPA consider their ANPR comments for purposes of today's proposal action. This proposal supersedes any preliminary positions taken in the ANPR.

## II. EPA's Analytical Approach and Proposed Action on Petitions

*A. EPA's Proposed Interpretation of Section 126 and Analytical Approach for Determining Whether to Grant or Deny the Petitions*

1. The Appropriate Test Under Section 126

Section 126(b) provides that a State may petition EPA for a finding that specified sources or groups of sources in other States emit or would emit air pollutants ''in violation of the prohibition of section 110(a)(2)(D)(ii) of this title or this section.'' [1] Section 110(a)(2)(D) provides the requirement that a SIP:

> Contain adequate provisions:
> (i) prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—
> (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to (any) national ambient air quality standard, or
> (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility,
> (ii) insuring compliance with the applicable requirements of sections 126 and 115 (relating to interstate and international pollution abatement).

* * * * *

One issue is whether the cross-reference in section 126(b) to section 110(a)(2)(D)(ii) is valid, or instead should be considered to be a scrivener's error and be read to refer to section 110(a)(2)(D)(i). The EPA has offered the latter view in general and preliminary guidance. *See, e.g.,* 62 FR 55769 (Oct. 22, 1997) and 63 FR 24058 (Apr. 30, 1998).

Some have argued that section 126(b) should be read literally and that this reading would require EPA to deny the 8 petitions on grounds that section 126 allows a State to file a petition with EPA only to force other States to meet the requirements of section 126 itself (i.e., the requirement in section 126(a) that SIPs include provisions to require new and modified major stationary sources to give preconstruction notification to nearby States under certain circumstances). [2]

In the alternative, some have argued that, if in fact there is a scrivener's error, the proper cross-reference should be to section 110(a)(2)(D)(i)(II), and not section 110(a)(2)(d)(i)(I). UARG letter. The effect of this reading would be to limit section 126 petitions to cases in which the upwind sources are adversely affecting clean areas under the prevention of significant deterioration requirements of part C of title I of the CAA, or visibility.

The EPA believes that there is a scrivener's error in section 126. Furthermore, EPA disagrees that the scrivener's error is a misreference to section 110(a)(2)(D)(i)(II). In this

[1] The cross-reference to section 110(a)(2)(D)(ii) is repeated 3 times in section 126(b). The EPA will refer to these cross-references in the singular.

[2] *See* Letter from Henry V. Nickel, et al., Counsel for the Utility Air Regulatory Group, to Carol M. Browner, Administrator, U.S. EPA, November 21, 1997 (UARG Letter); Letter from Betty D. Montgomery, Attorney General of Ohio et. al., to Richard Wilson, Acting Assistant Administrator for Air & Radiation, U.S. EPA, November 5, 1997 (letters included in the docket to this rulemaking).

proposed action, EPA takes the position that the reference in section 126(b) to section 110(a)(2)(D)(ii) is a drafting error and that Congress intended to reference section 110(a)(2)(D)(i). The merit of this statutory interpretation is apparent on several levels. First, the reference to ''the prohibition of section 110(a)(2)(D)(ii)'' is ambiguous at best, and arguably nonsensical, since section 110(a)(2)(D)(ii) contains no prohibition, yet 110(a)(2)(D)(i) does. Second, the statutory cross reference contained in section 126(b), if taken on its face, would render section 126(b) largely meaningless. Finally, the legislative history of the CAA Amendments supports this interpretation. The EPA's interpretation is consistent with the reading of the CAA prior to the 1990 Amendments and Congress expressed no indication that it meant to substantively revise this provision of the statute at the time it administratively renumbered the provision.

The EPA also does not believe that the reference to section 110(a)(2)(D)(ii) is a mistaken cross-reference to section 110(a)(2)(D)(i)(II). Such a cross-reference would limit the availability of section 126 to the prevention of significant deterioration and visibility provisions of section 110(a)(2)(D)(i), a severe limitation for which there is no indication in the legislative history.

Section 126(b) authorizes the EPA to find that any major source or group of stationary sources emits or would emit any air pollutant ''in violation of the *prohibition of section (a)(2)(D)(ii)* of this title or this section'' (emphasis added). However, section 110(a)(2)(D)(ii) contains no prohibition. Rather, it provides that SIPs must ''contain adequate provisions insuring compliance with'' statutory sections relating to interstate and international pollution abatement.

By contrast, section 110(a)(2)(D)(i)—the provision that EPA believes Congress intended to cross-reference in section 126(b)—does contain a prohibition. It requires that SIPs contain adequate provisions ''prohibiting'' any source or other type of emissions activity within the State from emitting any air pollutant in amounts that, among other things, will contribute significantly to nonattainment in, or interfere with maintenance by, another State with respect to the NAAQS. Thus, the textual interplay between sections 126(b) and 110(a)(2)(D) provides strong evidence that the CAA contains ''a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design.'' *In re Chateaugay Corp.*, 89 F.3d 942, 954 (2d Cir. 1996) (holding that courts are empowered to correct an erroneous statutory cross-reference that inadvertently results from legislative changes (quoting *United States Nat'l Bank* v. *Independent Ins. Agents*, 508 U.S. 439, 462 (1993)); *see also, United States* v. *Gibson*, 770 F.2d 306, 308 (2d Cir. 1985) (per curiam) (correcting ambiguity in criminal fraud statute that resulted from the error of a scrivener in using the word 'and' rather than 'or' when codifying the statute).

As further support, reading section 126(b) as cross-referencing section 110(a)(2)(D)(ii) essentially renders that provision redundant and meaningless. Section 126 allows a party to petition EPA with respect to a ''violation of the prohibition in section 110(a)(2)(D)(ii) or this section.'' Section 110(a)(2)(D)(ii) cross-references back to section 126, as well as to section 115. To the extent section 110(a)(2)(D)(ii) cross-references back to section 126, the statute is redundant. Reading the two provisions together, section 126 would provide an opportunity for parties to file a petition claiming that a SIP violates the prohibition of section 110(a)(2)(D)(ii) (i.e., section 126) or this section (i.e., section 126).

Moreover, to the extent section 110(a)(2)(D)(ii) references section 115, the provision is meaningless. There is no relief that can be provided under section 126. Sections 126 and 115 create separate processes for different parties to petition the Agency for a finding that SIP is inadequate. Under section 115, the Administrator may issue a SIP Call to a State based on a request by an international agency or the Secretary of State that an air pollutant or pollutants emitted in the United States ''cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country.'' In contrast, only ''States'' or ''political subdivisions''—entities under the jurisdiction of the United States—may request relief under section 126. If Congress intended States or political subdivisions in the United States with the opportunity to seek relief for pollution transported to foreign countries, Congress could have provided so in a much clearer fashion in section 115. It is highly doubtful that Congress would have used such a cryptic reference to grant political entities within the United States the power to address pollution being transported out of the country from other States.

Finally, EPA's interpretation that there is a scrivener's error and that the reference should be to section 110(a)(2)(D)(i), fits with the legislative history on this provision. Courts ''recognize that during the drafting process an error may creep in,'' and that ''statutes are not drafted with mathematical precision, and should be construed with some insight into Congress' purpose at the time of the enactment.'' *In re Chateaugay Corp.*, 89 F.3d at 953. Here, the legislative history, as set forth in the Senate Report and the House Conference Report regarding the 1990 CAA Amendments, provides additional, persuasive evidence that section 126(b)'s cross-reference to section 110(a)(2)(D)(ii) is erroneous. *See Pierpont* v. *Barnes*, 94 F.3d 813, 817 (2d Cir. 1996) (committee reports are ''particularly good indicator(s) of congressional intent,'') cert. denied, 117 S. Ct. 1691 (1997).

To start, the Senate Report observes that the CAA, prior to the 1990 amendments, allowed section 126 to be used only for violations of section 110(a)(2)(E)(i), which ''relate(d) to the preparation of SIP(s).'' S. Rep. No. 101–228, 101st Cong., 2d Sess. 75 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3461. Thus, under section 126(b)'s pre-1990 version, ''a State being injured by another State's pollution (could) file a complaint about the offending State's SIP, but not the pollution itself.'' *Id.* at 76, 1990 U.S.C.C.A.N. 3385, 3462. Notably, the Senate Report makes no mention of changing section 126(b)'s cross-reference to section 110(a)(2)(E)(i)— nor would it, since section 110(a)(2)(E)(i) had defined the SIP violation historically redressable under section 126(b). Because the amendments simply revised the text of former section 110(a)(2)(E)(i) and then renumbered it as section 110(a)(2)(D)(i), *compare* 42 U.S.C.A. 7410(a)(2)(E)(i) (1990) *with* 42 U.S.C.A. 7410(a)(2)(D)(i) (1995), [3] there is substantial reason to believe that section 126(b)'s current cross-reference to section 110(a)(2)(D)(*ii*) is mistaken.

Indeed, ''[w]hen Congress revises and renumbers existing laws, a court should not infer any legislative aim to change the law's effect unless such intention is clearly expressed.'' *In re Chateaugay Corp.*, 89 F.3d at 953 (citing *Finley* v. *United States*, 490 U.S. 545, 554 (1989)). Far from expressing a clear intent to effectuate the fundamental change in law that would result from section 126(b)'s new cross-reference to section 110(a)(2)(D)(ii), the legislative history for the 1990 CAA Amendments actually

[3] The 1990 CAA Amendments revised section 110(a)(2)(D) by dropping certain provisions not relevant here, and incorporating other provisions previously contained in section 110(a)(2)(E). *See* CAA Amendments of 1990, Pub. L. 101–549, 101(b), 104 Stat. 2404(1990); S. Rep. No. 101–228, 101st Cong., 2d Sess. 20 (1989), *reprinted* in 1990 U.S.C.C.A.N. 3385, 3406.

demonstrates a contrary purpose. According to the House Conference Report, these amendments sought to ''enhance the enforcement authority of the Federal government under the CAA, ''including ''EPA enforcement authority regarding violations of State Implementation Plans.'' H. Rep. No. 101–952, 101st Cong. 2d Sess. 347 (1990), *reprinted in,* 1990 U.S.C.C.A.N. 3385, 3879. As noted above, however, the ambiguous change in section 126(b)'s cross-reference would apparently divest the EPA of its former jurisdiction to redress—via the section 126 petition process—SIP violations regarding interstate pollution. See 42 U.S.C.A. 7426(b) (1990) (authorizing EPA to adjudicate petitions alleging violations of SIP requirements that are now substantially incorporated into section 110(a)(2)(D)(i)). Given the lack of any legislative history that would support such a significant shift in policy, and considering Congress' stated desire to enhance the EPA's SIP enforcement authority, this contradictory result is highly suspect. *See* In re Chateaugay Corp., 89 F.3d at 953 (''where it appears plain that an error in drafting has occurred, so that a literal construction would make a dramatic change in long-standing law, it is both sensible and permissible for judges to consider, in conjunction with other factors, Congress' complete silence on the literal effect of the change.'')[4]

The EPA believes that its proposed interpretation is permissible because it resolves the ambiguity in the interplay between sections 126 and 110(a)(2)(D) in a manner that harmonizes and gives meaning to all of their provisions and reasonably accommodates the purposes of the provisions. *See Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837, 844 (1984).

[4] The Senate Report also expresses a congressional desire to promote the EPA's enforcement activity, not to constrain it. As the Senate committee observed, prior to 1990, the CAA ''allow(ed) a State to file a petition with the Administrator complaining of interstate air pollution (in violation of section 110(a)(2)(E)(i)), but not to file a lawsuit for violation of section 126. The amendment to section 304, (however,) allow(ed) a State, and citizens, to sue in Federal district court for violation of section 126.'' S. Rep. No. 101–228, 101st Cong., 2d Sess. 76 (1989), reprinted in 1990 U.S.C.C.A.N. 3385,3462. That Congress created a judicial mechanism by which to compel the EPA to respond to section 126 petitions is instructive. Because this legislative action is clearly inconsistent with any construction of the CAA that divests the EPA of its authority to enforce the very SIP requirements formerly contained in section 110(a)(2)(E)(i), it casts serious doubt upon the validity of section 126(b)'s amended cross-reference to section 110(a)(2)(D)(ii).

2. EPA's Analytical Approach for Determining Whether To Grant or Deny the Petitions

a. EPA's Interpretation of Significant Contribution under Section 110. The EPA's final $NO_X$ SIP call rule sets forth EPA's interpretations of section 110(a)(2)(D)(i)(I) in the context of regional transport of ozone. The EPA proposes and is seeking comment on retaining and employing those interpretations for purposes of determining, under section 126(b), whether any of the sources and source categories named in the petitions ''emits or would emit any air pollutant in violation of the prohibition'' of section 110(a)(2)(D)(i)(I). For purposes of this proposal, EPA incorporates into the proposal, by reference, the explanation of those interpretations, as well as all of the supporting rationale and technical support for them. See, especially, Section II of the preamble to the final $NO_X$ SIP call rule. Each of these steps is discussed in the remainder of Section II of this notice.

b. Applying EPA's Section 110 Interpretation of ''Significant Contribution'' and ''Interference'' under Section 126. The EPA proposes to apply its interpretation of section 110(a)(2)(D)(i)(I) to determine which if any $NO_X$ sources or source categories named in the section 126 petitions ''emits or would emit any air pollutant in violation of the prohibition'' in section 110(a)(2)(D)(i)(I). The EPA believes that its interpretations in the context of section 110 apply with relative ease to its decision under section 126, with one additional step noted below.

First, in acting on the section 126 petitions, EPA proposes to use the linkages it drew in the $NO_X$ SIP call rulemaking between specific upwind States and nonattainment and maintenance problems in specific downwind States. The EPA is seeking comment on and will carefully evaluate these linkages, and in particular, the linkages EPA has made between some of the more distant States, such as the linkages made between Alabama and Pennsylvania and Missouri and Pennsylvania.

In the next step, EPA determines which of that ''covered'' upwind State's major stationary $NO_X$ sources that are named in the downwind State's petition may emit in violation of the prohibition in section 110(a)(2)(D)(i) because they emit in amounts that contribute significantly to nonattainment in, or interfere with maintenance by, the petitioning State. For this, EPA proposes to use its analysis of highly cost-effective measures in the $NO_X$ SIP call rule to determine which of the covered upwind States' major stationary $NO_X$ sources named in the petitions emit $NO_X$ in amounts that contribute significantly. Thus, if EPA identified highly cost-effective measures for a particular source category in the $NO_X$ SIP call, then EPA proposes in this notice to make an affirmative ''technical determination''—i.e., a finding that any source in that category located in a covered upwind State emits in amounts that will contribute significantly to nonattainment in, or interfere with maintenance by, the petitioning State(s) linked to that upwind State.

This methodology applies both to a petition that names sources in the entire contributing upwind State and to a petition that names sources in only a small portion of an upwind contributing State. As described more fully in the $NO_X$ SIP call rulemaking, the only viable solution to ozone nonattainment is to apply pollution-reduction measures to a large collection of sources in many States, each one of which by itself may produce a small or perhaps immeasurable impact on the nonattainment problem for a particular area. Under this collective contribution approach, if EPA determines that the full set of $NO_X$ sources in an upwind State significantly contributes to nonattainment in, or interferes with maintenance by, a particular downwind State, then any $NO_X$ sources in the upwind State that can apply highly cost-effective control measures must be considered part of the solution to those downwind problems and therefore contributes to downwind nonattainment.

c. Emitting ''In Violation of the Prohibition'' in Section 110—the Decision Whether to Grant or Deny Each Petition. As noted above, the test under EPA's interpretation of section 126 is whether the sources named in the petitions emit in violation of the section 110(a)(2)(D)(i) prohibition. That prohibition, however, by the terms of section 110(a)(2)(D)(i), should be included in SIP provisions. The EPA has now issued its $NO_X$ SIP call rule under that section, and has set forth a track that upwind States must follow to satisfy its terms. Under the $NO_X$ SIP call, EPA has given the covered States until September 1999 to submit SIPs satisfying the rule, and has specified that those SIPs must prohibit the $NO_X$ emissions that contribute significantly by a date no later than May 1, 2003. By that rule, EPA has established emissions budgets for each State, which reflect elimination of the significant contribution of $NO_X$ emissions within

the State. The EPA has further established by rule May 1, 2003 as the final date by which all measures to meet that budget must be implemented. In addition, EPA has proposed a FIP that could be promulgated if a State fails to respond adequately to the $NO_X$ SIP call.

Section 126 calls for relief where EPA finds that sources are emitting ''in violation of the prohibition'' of section 110(a)(2)(D)(i). The EPA believes that it is sensible to interpret this language in light of the ongoing action of both States and EPA. Thus, so long as EPA and States (and ultimately the sources the State determines to regulate) are on track to meet the goals of the $NO_X$ SIP call, EPA believes it is appropriate to determine that sources are not emitting in violation of the prohibition in section 110(a)(2)(D)(i) for purposes of section 126(b). States and EPA will be on track if States timely submit a complete and approvable SIP and EPA acts promptly to approve the plan. In the alternative, if a State fails to submit in a timely manner a complete or approvable plan, efforts will be on track so long as EPA promulgates a FIP. The EPA further believes this approach is sensible because an alternative interpretation, which would result in a section 126 remedy going into effect despite timely action by States and EPA in response to the $NO_X$ SIP call, would lead to unnecessary and duplicative efforts. Such an approach would not only waste Agency resources, but could ultimately undermine efforts to reduce interstate transport by adding confusion to the process.

Based on this interpretation of the language in section 126, EPA has considered an alternative form of final action on the section 126 petitions that takes into account whether the State and/or EPA is on track to institute a satisfactory plan in response to the $NO_X$ SIP call rule.

As described in Section I above, the proposed consent decree would require EPA to take a final action on the section 126 petitions by April 30, 1999. In formulating the proposed consent decree, EPA developed an alternative approach that it believes would harmonize the section 126 and 110 actions. Specifically, paragraph 5.b. and c. state that:

> b. Unless EPA takes the final action described in paragraph 6, as to each individual petition, EPA's final action will be to—
>
> (i) Grant the requested finding, in whole or part; and/or
>
> (ii) Deny the petition, in whole or part.
>
> c. Unless EPA denies a petition in whole, its final action will include promulgation of a remedy under CAA section 126(c) for sources to the extent that a requested finding is granted with respect to those sources.

Then paragraph 6 states:

> 6. EPA shall be deemed to have complied with the requirements of Paragraph 5(a) if it instead takes a final action by April 30, 1999, that—
>
> a. makes an affirmative determination concerning the technical components of the ''contribute significantly to nonattainment'' or ''interfere with maintenance'' tests under CAA section 110(a)(2)(D)(i), 42 U.S.C. section 7410(a)(2)(D)(i);
>
> b. further provides that:
>
> (i) If EPA does not issue a proposed approval of the relevant Upwind State's SIP revision (submitted in response to the $NO_X$ SIP call) by November 30, 1999, then the finding will be deemed to be granted as of November 30, 1999, without any further action by EPA;
>
> (ii) If EPA issues a proposed approval of said SIP revision by November 30, 1999, but does not issue a final approval of said SIP revision by May 1, 2000, then the finding will be deemed to be granted as of May 1, 2000, without any further action by EPA;
>
> (iii) If EPA issues a final approval of said SIP revision by May 1, 2000, EPA must take any and all further actions, if necessary to complete its action under section 126, no later than May 1, 2000; and
>
> c. Promulgates a remedy under CAA section 126(c) for sources to the extent that an affirmative determination is made with respect to those sources.

The EPA believes that the alternative form of final action set forth in Paragraph 6 of the proposed decree best harmonizes sections 110(a)(2)(D)(i)(I) and 126. The EPA believes that sources in an upwind State should not be considered to be emitting an air pollutant in violation of the section 110 prohibition, and hence EPA should not grant a petition naming such sources, if the State is adhering to the $NO_X$ SIP call rule's schedule for submission of an approvable SIP revision, and EPA is acting speedily to approve the SIP—or, failing that, if EPA has promulgated a FIP for the State. After all, if EPA's rule provides a particular path for the development of a plan calling on sources to reduce interstate pollution by May 1, 2003, and under that rule either the upwind State or EPA is moving forward to develop, take action on or promulgate a satisfactory plan meeting that rule and achieving attainment as expeditiously as practicable, it would be difficult to conclude that an affected source in the upwind State ''emits or would emit in violation'' of the prohibition that the plan is not yet required to contain.[5]

For these reasons, EPA proposes to follow the alternative described in Paragraph 6 of the proposed decree. Thus, EPA proposes to structure its final action to contain: (1) A series of ''technical determinations'' as to which sources in which States named in the petitions would emit in violation of the section 110 prohibition if the State or EPA were to fall off track in putting a timely and satisfactory plan in place; (2) determinations that the petitions will automatically be deemed granted or denied on the basis of the events set forth in Paragraph 6; and (3) the remedial requirements that will apply to the sources receiving affirmative technical determinations if a petition naming those sources is ultimately deemed granted.

The EPA believes that the timeframes and triggers in Paragraph 6 are reasonable and feasible, and the Agency intends to execute them timely. For States that make a timely SIP submission, EPA believes it is feasible for the Agency to issue a proposed rule within 60 days of the submission deadline. Under the CAA, EPA is provided 60 days—but no more than 6 months—in which to affirmatively determine whether a submission is complete.

If EPA does not make an affirmative completeness determination, the submission is deemed complete. Once a submission is affirmatively found to be or is deemed complete, the CAA then provides EPA with 12 months to approve or disapprove the submission. Thus, at maximum, the CAA provides EPA with 18 months to approve or disapprove a SIP submission. The EPA is proposing a 7-month period to act on submissions in response to the $NO_X$ SIP call. While this period is shorter than the maximum period contemplated under the CAA, EPA believes that it is feasible and appropriate in the present circumstances. The EPA anticipates that the EPA Regional Offices will be working with States as States draft rules in response to the $NO_X$ SIP call and will be well prepared to issue a proposed determination within 60 days of the required submission date. Further, in light of EPA's work with the States in development of their plans, the 5-month period between proposal and final action should allow the Agency ample time to review any comments and to

[5] Moreover there does appear to be tension between section 110(a)(2)(D), which does not establish the timing as to when the SIP prohibition needs to be effective against sources (i.e., when sources need to implement controls to reduce emissions) and the timing in section 126, which requires implementation no later than 3 years following a section 126(b) determination. The EPA does not believe that Congress intended section 126 to be used to shorten timeframes for action that EPA has previously determined are approvable for purposes of eliminating significant contribution to nonattainment areas in other States.

prepare a final action. An additional benefit of this schedule for EPA action is that it will provide sources with certainty about the applicable requirements well before the latest implementation date that is permitted by the $NO_X$ SIP call. Moreover, if the State fails to submit an approvable plan, EPA will be well positioned to promulgate a FIP for the State, based on the FIP proposal that the Agency is issuing separately. It is important to achieve the $NO_X$ reductions necessary to protect public health and to attain the NAAQS as expeditiously as practicable. Therefore, where a State or EPA has failed to meet a deadline it will be critical to have the section 126 remedy go into effect as soon as possible thereafter in order to ensure that the $NO_X$ emission reductions are achieved as soon as practicable, which in the $NO_X$ SIP call EPA has determined to be May 1, 2003. The schedule EPA has proposed to enter into is intended to ensure that either the FIP or the 126 remedy goes into effect in order to achieve the $NO_X$ emission reductions by May 1, 2003.

*B. Weight of Evidence Determination of Named Upwind States*

As discussed above, in acting on the section 126 petitions EPA proposes to rely on the conclusions it drew in the final $NO_X$ SIP call rulemaking to determine whether the emissions in named upwind States contribute significantly to the 1-hour and 8-hour nonattainment and maintenance problems in the petitioning States. To evaluate the air quality impacts in the final $NO_X$ SIP call rulemaking, EPA used a weight-of-evidence approach involving three sets of modeling information: The State-by-State UAM–V zero-out modeling, the CAMx source apportionment modeling, and the OTAG subregional modeling and other information such as emission density and transport distance.[6] A number of ''metrics'' (i.e., measures of ozone contributions) were used to assess the air quality effects from several perspectives of contribution from sources in various upwind States. The technical details of the modeling information and metrics are described in the final $NO_X$ SIP call rulemaking.

The named upwind States which are linked as containing sources that are significant contributors to each petitioning State in the final $NO_X$ SIP call rulemaking are listed in Tables II–1 for the 1-hour NAAQS and Table II–2 for the 8-hour NAAQS. The information that EPA relied on in making these significance linkages is provided in the final $NO_X$ SIP call rulemaking. All of the information that is contained in the docket of the $NO_X$ SIP call rulemaking is incorporated by reference into this proposal. The EPA concluded from all of this information that the following 20 jurisdictions contain sources that make a significant contribution to nonattainment in, or interfere with maintenance by, one or more petitioning States under the 1-hour and/or the 8-hour NAAQS:

Alabama
Connecticut
Delaware
District of Columbia
Illinois
Indiana
Kentucky
Maryland
Massachusetts
Michigan
Missouri
New Jersey
New York
North Carolina
Ohio
Pennsylvania
Rhode Island
Tennessee
Virginia
West Virginia

TABLE II–1.—NAMED UPWIND STATES WHICH CONTAIN SOURCES THAT CONTRIBUTE SIGNIFICANTLY TO 1-HR NONATTAINMENT IN PETITIONING STATES

| Petitioning State (nonattainment area) | Named upwind States |
|---|---|
| New York | DE, DC, IN, KY, MD, MI, NC, NJ, OH, PA, VA, WV. |
| Connecticut | DE, DC, IN,* KY,* MD, MI,, NC,, NJ, NY, OH, PA, VA, WV. |
| Pennsylvania | NC, OH, VA, WV. |
| Massachusetts | OH, WV. |
| Rhode Island | OH, WV. |
| Maine | CT, DE, DC, MD, MA, NJ, NY, PA, RI. |
| New Hampshire | CT, DE,* DC,* MA, MD,* NJ, NY, PA, RI, VA.* |
| Vermont | None. |
| Total | CT, DE, DC, IN, KY, MA, MD, MI, NC, NJ, NY, OH, PA, RI, VA, WV. |

*Upwind States marked with an asterisk are included in the table because they contribute to an interstate nonattainment area that includes part of the petitioning State. Part of New Hampshire is included in the Boston/Portsmouth nonattainment area; part of Connecticut is included in the New York City nonattainment area.

TABLE II–2. NAMED UPWIND STATES WHICH CONTAIN SOURCES THAT CONTRIBUTE SIGNIFICANTLY TO 8-HR NONATTAINMENT IN PETITIONING STATES

| Petitioning State | Named upwind States |
|---|---|
| Pennsylvania | AL, IL, IN, KY, MI, MO, NC, OH, TN, VA, WV. |
| Massachusetts | OH, WV. |
| Vermont | None. |
| Total | AL, IL, IN, KY, MI, MO, NC, OH, TN, VA, WV. |

The EPA also concluded that sources in the following 11 States do not make a significant contribution to nonattainment in, or interfere with maintenance by, any of the petitioning States under the 1-hour and/or the 8-hour NAAQS:

[6] The UAM–V is the Variable-grid Urban Airshed Model. The CAMx is the Comprehensive Air Quality Model With Extensions.

Arkansas
Georgia
Iowa
Louisiana
Maine
Minnesota
Mississippi
New Hampshire
South Carolina
Wisconsin
Vermont

As discussed below, in Section II.F., EPA does not have the same level of information available regarding the named States of Maine, New Hampshire, and Vermont as it has for the other States named in petitions. Therefore, EPA intends to conduct further analyses on these three States. If the additional analyses show that sources in any of these States significantly contribute to a relevant petitioning State, EPA will issue a supplemental notice of proposed rulemaking based on the new information.

### *C. Cost Effectiveness of Emissions Reductions*

As described in Section II.A, above, the second prong of the significant-contribution interpretation that EPA applied in the $NO_X$ SIP call rule, and that EPA proposes to apply for purposes of this proposal, is the extent to which ''highly cost-effective'' $NO_X$ control measures are available for the types of stationary sources named in the petitions.[7].

As in the $NO_X$ SIP call rule, the EPA proposes to select these highly cost-effective measures by examining the technological feasibility, administrative feasibility and cost-per-ton-reduced of various multistate ozone season $NO_X$ control measures and determining what measures feasibly achieve the greatest $NO_X$ reductions and are among the most reasonable in light of other actions taken by EPA and States to control $NO_X$.[7]

[7] As discussed in this section, the highly cost-effective $NO_X$ controls happen to apply only to major stationary sources. Under section 126, EPA can make a finding for ''any major source or group of stationary sources.'' In other words, even if not all sources subject to this action were major, they would be part of a group of stationary sources that contribute significantly to nonattainment and hence could potentially be subject to finding.

[7] As discussed in this section, the highly cost-effective $NO_X$ controls happen to apply only to major stationary sources. Under section 126, EPA can make a finding for ''any major source or group of stationary sources.'' In other words, even if not all sources subject to this action were major, they would be part of a group of stationary sources that contribute significantly to nonattainment and hence could potentially be subject to a finding.

#### 1. What $NO_X$ Controls Are Highly Cost Effective

The first step in the cost-effectiveness process was to identify the types of sources named in the various petitions. The petitioning States have identified the source categories that they believe significantly impact their ability to achieve attainment of the ozone standard. These categories are listed in Table I–1 earlier in this notice. The EPA has determined that the named source categories can be combined into one general category—fossil fuel-fired indirect heat exchangers. This term applies to boilers and turbines used for the production of steam, electricity, and in some cases mechanical work, and to process heaters. To assure equity among the various subcategories of such sources and the industries they represent, EPA considered the cost effectiveness of controls for each subcategory separately throughout the affected 20-jurisdiction region described in Section II.B above. Sources are combined into a common subcategory if they serve the same general industry (e.g., boilers and turbines that are used by the electricity generation industry are combined in the same subcategory). The EPA believes that this categorization better reflects the industrial sectors served. Thereby, the EPA split the population of indirect heat exchanges into four subcategories, consistent with the approach EPA took in the final $NO_X$ SIP call: (1) A subcategory of boilers and turbines serving generators greater than 25 MWe that produce electricity for sale to the grid (''large EGUs''); (2) a subcategory of boilers and turbines with a heat input greater than 250 mmBtu/hr that exclusively generate steam and/or mechanical work (e.g., provide energy to an industrial pump), or produce electricity for internal use only and not for sale (''large non-EGUs''); (3) a subcategory of process heaters with a heat input greater than 250 mmBtu/hr (''large process heaters''); and (4) a subcategory of smaller indirect heat exchangers, i.e., all such sources not included in the first three subcategories (''small sources'').

As mentioned above, in evaluating the cost effectiveness of $NO_X$ controls for indirect heat exchangers, the EPA has taken the same approach as that taken in the final $NO_X$ SIP call. See generally, Section II.D of the preamble to the final $NO_X$ SIP call rule. In short, for each subcategory, the amounts of emissions that cause subcategories in the covered upwind States to contribute significantly to a petitioning State's nonattainment were determined based on the application of $NO_X$ controls that achieve the greatest feasible emissions reduction while still falling within a cost-per-ton-reduced range that EPA considers to be highly cost effective. The $NO_X$ controls for this rulemaking were considered highly cost effective for the purposes of reducing ozone transport to the extent they achieve the greatest feasible emissions reduction but still cost no more than $2,000 per ton of ozone season $NO_X$ emissions removed (in 1990 dollars), on average, for each subcategory. The discussion below further describes the basis for this cost amount and the techniques used for each subcategory. The EPA believes that certain controls that cost more than $2,000 per ton of $NO_X$ reduced are reasonably cost effective in reducing ozone transport or in achieving attainment with the ozone NAAQS in specific nonattainment areas; however, EPA proposes to base the significant-contribution determination on only highly cost-effective reductions. In addition, as discussed further below, in determining whether to assume reductions from the small source subcategory, EPA considered administrative efficiency in evaluating this subcategory.

More specifically, to determine what level of control can be considered highly cost effective, EPA considered other recently undertaken or planned $NO_X$ control measures. Table II–3 provides a reference list of measures that EPA and States have undertaken to reduce $NO_X$ and their average annual costs per ton of $NO_X$ reduced. These measures cost up to $2,000 per ton. With few exceptions, the average cost effectiveness of these measures is representative of the average cost effectiveness of the types of controls EPA and States have needed to adopt most recently, since their previous planning efforts have already taken advantage of opportunities for even cheaper controls. The measures listed in Table II–3 generally represent the average costs (i.e., middle of the range of costs) that the nation has been willing to bear recently to reduce $NO_X$. The EPA believes that the cost effectiveness of measures that it or States have adopted, or proposed to adopt, forms a good reference point for determining which of the available additional $NO_X$ control measures are among the most cost-effective measures that can be implemented by the sources considered in today's action.

TABLE II–3.—AVERAGE COST EFFECTIVENESS OF $NO_X$ Control Measures Recently Undertaken For Stationary Sources

[1990 $]

| Control measure | Cost per ton of $NO_X$ removed |
|---|---|
| $NO_X$ RACT | 150–1,300. |
| Final $NO_X$ SIP call | Up to 2,000. |
| State Implementation of the Ozone Transport Commission Memorandum of Understanding | 950–1,600. |
| New Source Performance Standards for Fossil Steam Electric Generation Units | 1,290. |
| New Source Performance Standards for Industrial Boilers | 1,790. |

The EPA notes that there are also a number of less expensive measures recently undertaken by the Agency to reduce $NO_X$ emission levels that do not appear in Table II–3. These actions include the title IV $NO_X$ reduction program. Though these actions are very cost effective, the Agency is focusing on what other measures exist, at a potentially higher (though still not the highest reasonable) cost-effectiveness value, that can further reduce $NO_X$ emissions. Table II–3 is thereby useful as a reference of the next higher level of $NO_X$ reduction cost effectiveness that the Agency considers among the most reasonable to undertake. As a result, the Agency proposes that $NO_X$ controls that can feasibly be achieved and have an average subcategory-specific cost effectiveness less than $2,000 per ton of $NO_X$ removed be considered highly cost effective. The subcategories that EPA proposes to control are those major stationary sources in the named categories for which EPA finds that these highly cost-effective controls are available.

2. Determining the Cost Effectiveness of $NO_X$ Controls

In an effort to determine what, if any, highly cost-effective mix of controls is available for each subcategory (i.e., large EGUs, large non-EGUs, large process heaters, and small sources) the Agency considered the average cost effectiveness of alternative levels of controls for each subcategory as described in the final $NO_X$ SIP call. That analysis is summarized here. The average cost effectiveness of the controls was calculated from a baseline level that included all currently applicable Federal or State $NO_X$ control measures for each subcategory. The baseline did not include Phase II and Phase III of the OTC $NO_X$ MOU since those measures are not federally required and they have not yet been adopted by all the involved States;[8] if the MOU were included in the baseline, the overall costs would be lower. In determining the cost of $NO_X$ reductions from large EGUs, EPA assumed an emissions trading system. As discussed in the final $NO_X$ SIP call, EPA evaluated and compared the likely air quality impacts both with and without a multistate $NO_X$ emissions trading system for electricity generating sources. This analysis shows that a multistate trading program causes no significant adverse air quality impacts. Because such a program would result in significant cost savings, EPA's cost-effectiveness determination for large electricity generating boilers and turbines (i.e., the majority of the core group of sources in the trading program) assumes sources will participate in a multistate trading program.[9] For non-EGU sources, EPA used a least cost method which is equivalent to an assumption of an intrastate trading program. Inclusion of these sources in a multistate trading program would provide further cost savings.

Table II–4 summarizes the control options investigated for each subcategory covered by the petitions and the resulting average, multistate cost effectiveness as presented in EPA's final $NO_X$ SIP call. Note that these cost figures are obtained by performing the analysis over the 23-jurisdiction $NO_X$ SIP call area. The values will be only slightly different for the States covered by this action; those differences are insignificant for purposes of identifying highly cost-effective controls. Additionally, the cost effectiveness analysis included a consideration of each subcategory's growth, including new sources. Thus, the control levels arrived at are cost-effective for new sources also.

TABLE II–4.—AVERAGE COST EFFECTIVENESS OF OPTIONS ANALYZED [10]

[1990 dollars in 2007]

| Subcategory | Average cost-effectiveness ($/ozone season ton) for each control option | Average cost-effectiveness ($/ozone season ton) for each control option | Average cost-effectiveness ($/ozone season ton) for each control option |
|---|---|---|---|
| Large EGUs | 0.20 lb/mmBtu | 0.15 lb/mmBtu | 0.12 lb/mmBtu. |
| | $1,263 | $1,468 | $1,760. |
| Large Non-EGUs | 50% reduction | 60% reduction | 70% reduction. |
| | $1,235 | $1,477 | $2,155. |
| Process Heaters | $3,000/ton maximum per source. | $4,000/ton maximum per source. | $5,000/ton maximum per source. |
| | $2,859 | $2,891 | $2,891. |

[10] The cost-effectiveness values in Table II–4 are multistate averages. In the case of large EGUs the cost-effectiveness values represent reductions beyond those required by title IV or title I RACT, where applicable. For large non-EGUs and process heaters, the cost-effectiveness values represent reductions from uncontrolled levels.

[8] However, in the Regulatory Analysis of the final $NO_X$ SIP call, EPA evaluates the economic impact of including the MOU in the baseline for the electric power industry.

[9] The EPA envisions sources in States that are covered by (1) the section 110 $NO_X$ SIP call, (2) the section 110 FIP, or (3) section 126, to be able to trade among each other.

The following discussion explains the controls determined by EPA to be highly cost-effective for each subcategory.

i. Large EGUs. For large EGUs, the control level was determined by applying a uniform $NO_X$ emissions rate across the 20 jurisdictions potentially subject to section 126 findings. The cost-effectiveness for each control level was determined using the Integrated Planning Model (IPM). Details regarding the methodologies used can be found in the Regulatory Impact Analysis of the $NO_X$ SIP call rulemaking. Table II–4 summarizes the control levels and resulting cost effectiveness of three levels analyzed.

A regionwide level of 0.20 lb/mmBtu was rejected because though it resulted in an average cost effectiveness of less than $2,000 per ton, the air quality benefits were less than those for the 0.15 lb/mmBtu level which was also less than $2,000 per ton. The results suggest that a multistate level of 0.15 lb/mmBtu should be assumed when determining the emission levels for this subcategory. This control level has an average cost-effectiveness of $1,468 per ozone season ton removed.[11] This amount is consistent with the range for cost-effectiveness that EPA has derived from recently adopted (or proposed to be adopted) control measures.

The EPA acknowledges that a control level of 0.12 lb/mmBtu, which carries a cost effectiveness of $1,760 per ozone season ton removed, appears to be within the upper range of cost effectiveness. However, for reasons explained in Section II.D. of the final $NO_X$ SIP call, the EPA is proposing in the section 126 action not to base the EGU control level on 0.12 lb/mmBtu. Therefore, EPA proposes to retain and apply here its determination from the $NO_X$ SIP call rulemaking that it is highly cost effective to control emissions from large EGUs to a control level corresponding to 0.15 lb/mmBtu.

ii. Large Non-EGUs. The EPA determined a highly cost-effective control level for large non-EGUs by applying a uniform percent reduction multistate in increments of 10 percent. Details regarding the methodologies used are in the Regulatory Impact Analysis. Table II–4 summarizes the control levels and resulting cost effectiveness for non-EGUs.

For large non-EGUs, the cost-effectiveness determination includes estimates of the additional emissions monitoring costs that sources would incur in order to participate in a trading program. Some non-EGUs already monitor their emissions. In the proposed $NO_X$ SIP call, EPA had not included monitoring costs in the cost-effectiveness determination because such costs could not be estimated at that time. Since then, EPA has evaluated monitoring system costs. These costs are defined in terms of dollars per ton of $NO_X$ removed so that they can be combined with the cost-effectiveness figures related to control costs. Monitoring costs varied from about $150 to $400 per ton of $NO_X$ removed, depending on the type of subcategory.

The EPA, therefore, proposes to retain and apply here its determination from the $NO_X$ SIP call rulemaking that for large non-EGUs a control level corresponding to 60 percent reduction from baseline levels is highly cost effective (this percent reduction corresponds to a multistate control level of about 0.17 lb/mmBtu).

iii. Large Process Heaters. For large process heaters, the control level was determined by applying various cost-effectiveness thresholds, because trading was not assumed to be readily available for this subcategory. Details regarding the methodologies used are in the Regulatory Impact Analysis. Table II–4 summarizes the control levels and resulting cost effectiveness for each option under this subcategory.

The EPA determined that controlling process heaters, though reasonably cost effective, is not highly cost effective. Thus EPA proposes that these sources do not emit in amounts that significantly contribute to petitioning States' nonattainment or maintenance problems.

iv. Small Sources. For the subcategory of small sources, EPA is proposing to determine that no additional control measures or levels of control are highly cost effective and feasible to mandate. For the purposes of this rulemaking, EPA considers the following sizes of point sources to be small: (1) Electricity generating boilers and turbines serving a generator 25 MWe or less, and (2) other indirect heat exchangers with a heat input of 250 mmBtu/hr or less. In the $NO_X$ SIP call, EPA found that the collective emissions from small sources were relatively small (in the context of that rulemaking) and the administrative burden, to the permitting authority and to regulated entities, of controlling such sources was likely to be considerable.

In today's action, for the same reasons as described in the final $NO_X$ SIP call, EPA proposes that these sources do not emit in amounts that significantly contribute to petitioning States' nonattainment or maintenance problems. Further discussion concerning small point sources may be found in the final $NO_X$ SIP call preamble.

v. Summary of Control Measures. Table II–5 summarizes the controls that are assumed for each subcategory. More detailed discussions of the controls assumed are contained in the sections that describe each sector.

TABLE II–5.—SUMMARY OF FEASIBLE, HIGHLY COST-EFFECTIVE $NO_X$ Control Measures

| Subcategory | Control measures |
|---|---|
| Large EGUs | State-by-State ozone season emissions level (in tons) based on applying a $NO_X$ emission rate of 0.15 lb/mmBtu on all applicable sources. |
| Large Non-EGUs | State-by-State ozone season emissions level (in tons) based on applying a 60 percent reduction from uncontrolled emissions on all applicable sources. |
| Large Process Heaters | No additional controls highly cost effective. |
| Small Sources | No additional controls highly cost effective. |

3. Other Cost-Related Considerations

The EPA has addressed other cost-related considerations as described in Section II.D of the final $NO_X$ SIP call notice. The EPA proposes to rely on that analysis in this rulemaking.

*D. Identifying Sources*

As discussed previously, all of the petitions named specific upwind source categories as significantly contributing

[11] It should be noted that in the final $NO_X$ SIP call EPA also investigated the regionwide cost-effectiveness of $NO_X$ reductions if each State individually met the budget component for large electricity generating boilers and turbines (i.e., through intra-state trading). In the case of the 0.15 lb/mmBtu strategy intra-State trading resulted in a regionwide cost-effectiveness of $1,499/ton compared to $1,468/ton for regionwide trading.

to nonattainment in, or interfering with maintenance by, the petitioning State. Four petitioning States (Massachusetts, New Hampshire, New York, and Rhode Island) also attempted to identify the existing sources in the targeted source categories. However, the petitioners cautioned EPA that the lists might not be complete and that any omissions were unintentional. In addition, the EPA has received several comments from sources on the State lists saying that they do not meet the source category definitions provided in the petitions. In order to identify and verify the sources in the named source categories for the geographic areas covered by each petition, EPA used the most up-to-date emission inventory available. These data sources are described in Section III of this notice. The existing sources in the source categories for which EPA is making an affirmative technical determination are listed in Appendix A to proposed part 97. The EPA seeks comment on whether it has identified correctly the sources covered by the petitions.

*E. Air Quality Assessment*

In the final $NO_X$ SIP Call rulemaking, EPA evaluated the ozone benefits in the petitioning States of $NO_X$ controls proposed in today's action. The EPA believes that the results of that modeling analysis are valid for the purpose of this proposed rulemaking, as well. The EPA performed the modeling for the 23 jurisdictions covered in the $NO_X$ SIP Call to confirm that those States collectively contribute significantly to downwind nonattainment. The collective contribution of all the upwind States is one factor that went into EPA's decision that each individual upwind State contributes significantly to downwind nonattainment.

The ozone benefits determined in the final $NO_X$ SIP Call were based on air quality modeling of the emissions scenarios described below. Each emissions scenario was modeled by EPA using UAM–V run for all four of the OTAG episodes (i.e., July 1–11, 1988; July 13–21, 1991; July 20–30, 1993; and July 7–18, 1995). In brief, the emissions scenarios include a 2007 Base Case and a control scenario designed to evaluate the effects of $NO_X$ controls on nonattainment in downwind States, including each of the petitioning States. The Base Case scenario accounts for growth in emissions and reductions associated with Clean Air Act mandated controls and additional Federal measures. In the control strategy scenario, $NO_X$ emissions from utility and non-utility sources were reduced by applying controls, very similar to those in today's proposal, to all such sources in the 23 jurisdictions which EPA has found, in the $NO_X$ SIP Call, contain emissions which make a significant contribution to nonattainment in downwind areas. The details on the development of these two emissions scenarios are described in the final $NO_X$ SIP Call rulemaking.

The EPA recognizes that the amount of emissions reduction in the modeled strategy is not identical to the amount of emissions reduction in today's proposal. This is because of differences in (a) the underlying emissions inventories and (b) the level of emissions controls applied to individual sources. However, the overall effect of these differences on the percent emissions reductions is small. Specifically, the difference in the total $NO_X$ emission reductions for the 20 jurisdictions covered by today's proposal between what was assumed in the modeling compared to what is being proposed today is only 3 percent. The EPA also recognizes that there are three additional upwind States (i.e., Georgia, South Carolina, and Wisconsin) which are controlled in the modeled strategy that are not covered by today's proposal. These three States were covered in the $NO_X$ SIP Call because of their contributions to States other than the petitioning States. Since EPA believes that emissions from sources in these States do not contribute significantly to nonattainment in any of the petitioning States, it is reasonable to assume that emissions reductions in these States will not have any appreciable impact on nonattainment in any of the petitioning States. The EPA believes that the differences between today's proposal and what was modeled, as described above, are relatively small, and thus, the overall conclusions on air quality benefits from the modeled strategy are applicable to the controls in today's proposal.

The EPA used a number of ''metrics'' (i.e., measures of ozone contribution or impact) to evaluate the air quality benefits in the petitioning States of the proposed $NO_X$ controls. The technical details of the air quality modeling information and metrics are described in the final $NO_X$ SIP call rulemaking. The results of this modeling indicate that the proposed $NO_X$ controls applied to the sources in the upwind States proposed as making a significant contribution to nonattainment in one or more of the petitioning States will provide substantial ozone benefits in each of the petitioning States.

*F. Conclusions on Granting or Denying the Petitions*

The EPA is proposing action on the petitions based on the outcome of the multi-step process described in the preceding sections. The EPA's proposed action consists of three components: (1) Technical determinations of which upwind sources or source categories named in each petition significantly contribute to nonattainment or interfere with maintenance of the relevant ozone standard in each petitioning State; (2) action specifying when a finding that such sources emit or would emit in violation of the section 110(a)(2)(D)(i)(I) prohibition will be deemed made or not made (or made but subsequently withdrawn) and, thus, when a petition for such a finding will be deemed granted or denied (or granted but subsequently denied) for purposes of section 126(b); and (3) the specific emissions-reduction requirements that will apply when such a finding is deemed made. Each of these proposed actions is described in more detail below. Under EPA's proposed action, certain types of new and existing sources in 20 upwind States are potentially subject to a section 126(b) finding and therefore to the requirements set forth in this proposal.

1. Technical Determinations

First, EPA proposes to make affirmative and negative technical determinations as to which of the new (or modified [12]) or existing major sources or groups of stationary sources named in each petition emit or would emit $NO_X$ in amounts that will contribute significantly to nonattainment of the 1-hour or 8-hour standard in (or interfere with maintenance of the 8-hour standard by) each respective petitioning State. The regulatory text accompanying today's proposal sets forth each of those proposed technical determinations for sources named in each petition.

In short, for each petition, with respect to each ozone standard, EPA proposes to make affirmative technical determinations of significant contribution (or interference) for those large EGU and non-EGU sources for which highly cost-effective controls are available (as described in Section II.C.), to the extent those sources are located in one of the ''Named Upwind States'' corresponding to that petition in Tables II–1 and II–2. Thus, to illustrate, for the petition from New York, EPA proposes to find that large EGUs and non-EGUs

[12] Whenever the word ''new'' is used in relation to sources affected by this proposed rule, it includes both new and modified sources.

of the types described in Section II.C. that are located in the named portions of Delaware, the District of Columbia, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Virginia, and West Virginia emit $NO_X$ in amounts that contribute significantly to nonattainment of the 1-hour standard in New York. By contrast, EPA proposes to find that such sources located in Tennessee, which New York also named in its petition, do not emit $NO_X$ in amounts that have that effect on New York. The result is that EPA proposes to find that the large EGUs and non-EGUs in at least some upwind States named in every petition except Vermont's contribute significantly to nonattainment of at least one of the standards (or interfere with maintenance of the 8-hour standard) in the petitioning State. The EPA refers the reader to the regulatory text for a full description of each of the proposed technical determinations for each petition.

The EPA notes that the Agency is not proposing to make affirmative technical determinations as to any sources located in Vermont, New Hampshire, or Maine. That is because, based on the more limited modeling and other assessments that EPA has done thus far with respect to those States, EPA is not yet prepared to conclude that sources in any of those States do contribute significantly to nonattainment (or interfere with maintenance) of an ozone standard in any downwind State named in one of those three States in its petition.[13] However, EPA is continuing to study the impacts of sources in those States on downwind States, so that it can make final decisions based on the fuller set of information available today for other States. If EPA believes, after completing its assessments, that large EGU or non-EGU sources in any of those three States do contribute significantly to downwind air quality problems in any of the States that name them in their petitions, EPA will issue a supplemental notice of proposed rulemaking based on those results.

Appendix A to proposed part 97 lists all existing sources for which EPA proposes to make an affirmative technical determination linking those sources to at least one petitioning State. These are the existing sources that could receive a positive section 126(b) finding, depending on the circumstances described in the next section.

[13] Maine's petition named sources in Vermont and New Hampshire and New Hampshire's petition named sources in Maine and Vermont.

2. Action on Whether To Grant or Deny Each Petition

a. Portions of Petitions for Which EPA Is Proposing an Affirmative Technical Determination. For the reasons described in Section II.A.2.c., EPA proposes to issue the type of final action on the petitions described in that section. Under that approach, EPA's final action for sources that EPA is proposing an affirmative technical determination would provide that a finding that certain sources emit or would emit in violation of the prohibition in section 110(a)(2)(D)(i)(I) would be deemed made as of certain specified dates if certain events do not occur by those dates. More specifically, a finding that new or existing sources, for which EPA has made an affirmative technical determination, do emit in violation of section 110(a)(2)(D)(i)(I) would be deemed made:

- As of November 30, 1999, if by such date EPA does not issue either a proposed approval, under section 110(k) of the CAA, of a State implementation plan revision submitted by such State to comply with the requirements of section 110(a)(2)(D)(i)(I) of the CAA; or final Federal implementation plan meeting such requirements for such State in which the affected sources are or will be located,
- As of May 1, 2000, if by November 30, 1999, EPA takes the action described above for such State, but, by May 1, 2000, EPA does not approve or promulgate implementation plan provisions meeting such requirements for such State.

The EPA also proposes to find, as described earlier, that any such finding as to any such major source or group of stationary sources would be considered a finding under section 126(b) and, therefore, would trigger the remedial requirements of the final rule. At such time as a finding is deemed made, EPA intends to publish a notice in the **Federal Register** announcing the source categories and locations affected by the finding.

Furthermore, EPA proposes that as to any portion of a petition for which EPA has made an affirmative technical determination (as described above) that portion of the petition shall be deemed denied as of May 1, 2000, if a section 126(b) finding has not been deemed to have been made by that date. In other words, if EPA has taken final action putting into place an implementation plan meeting the requirements of section 110(a)(2)(D)(i)(I) by May 1, 2000, any outstanding portions of petitions will be deemed denied by that date. In addition, after a section 126(b) finding has been deemed made as to sources or groups of stationary sources in an upwind State, that finding will be deemed withdrawn, and the corresponding part of the relevant petition(s) denied, if the Administrator either approves a SIP or promulgates a FIP which complies with the requirements of section 110(a)(2)(D)(i)(I) for such upwind State. This would minimize any overlap between an effective section 126(b) finding, on one hand, and the application of satisfactory SIP or FIP provisions, on the other.

b. Portions of Petitions for Which EPA Is Proposing a Negative Technical Determination. Consistent with this overall approach, EPA proposes that the sources for which EPA would make a negative technical determination (as described above) do not or would not emit in violation of the section 110(a)(2)(D)(i)(I) prohibition. As a result, EPA proposes to deny each aspect of each petition relating to such sources. For example, EPA proposes to deny New York's petition as to sources in any State (or portion of a State) named in New York's petition that is outside the large EGU and non-EGU categories described in Section II.C., as well as any named sources of any type in Tennessee. Another example is that EPA proposes today to deny Vermont's section 126 petition in its entirety, because EPA proposes to find that no sources named in Vermont's petition, in any of the upwind States that the petition names, contribute significantly to nonattainment of either the 1-hour or the 8-hour standard, nor interfere with maintenance of the 8-hour standard, in Vermont.

3. Requirements for Sources for Which EPA Makes a Section 126(b) Finding

The EPA proposes in Section III, below, the requirements that would apply to any new or existing major source or group of stationary sources for which a section 126(b) finding is ultimately made under the approach just described. Section 126(c) states, in relevant part, that:

> it shall be a violation of this section and the applicable implementation plan in such State
>
> (1) for any major proposed new (or modified) source with respect to which a finding has been made under subsection (b) to be constructed or to operate in violation of this section and the prohibition of section 110(a)(2)(D)([i]) or this section or
>
> (2) for any major existing source to operate more than three months after such finding has been made with respect to it.

The Administrator may permit the continued operation of a source referred to in paragraph (2) beyond the expiration of such three-month period if

such source complies with such emission limitations and compliance schedules (containing increments of progress) as may be provided by the Administrator to bring about compliance with the requirements contained in section 110(a)(2)(D)([i]) as expeditiously as practicable, but in no case later than three years after the date of such finding.

The remedial requirements that EPA proposes to apply to sources for which a section 126(b) finding is ultimately made would satisfy the requirements just quoted. First, EPA proposes to find that new sources for which a section 126(b) finding is ultimately made must comply with the requirements described in Section III to ensure that they do not emit in violation of the section 110(a)(2)(D)(i) prohibition. Second, the program EPA is proposing serves as the alternative set of requirements that the Administrator may apply for the purpose of allowing existing sources subject to a section 126(b) finding to operate for more than three months after the finding is made. Consistent with section 126(c), the compliance period in EPA's proposed program extends no further than three years from the making of the finding. To the extent a finding is deemed made as of November 30, 1999, compliance will be required by November 30, 2002. But since the program EPA is proposing would require actual emissions reductions only in the ozone season, actual reductions will not need to occur until May 1, 2003, the start of the first ozone season after the November 30, 2002, compliance date. Thus, compliance by November 30, 2002 would not require actual reductions until May 1, 2003. As described in Section V.A.1 of the final $NO_X$ SIP call, EPA believes that compliance by the ozone season beginning May 1, 2003 is feasible. Section III of this notice describes the proposed section 126 control requirements in greater detail.

## III. Federal $NO_X$ Budget Trading Program

### *A. Program Summary*

#### 1. Purpose of the Federal $NO_X$ Budget Trading Program

Under section 126(c), EPA proposes to implement the Federal $NO_X$ Budget Trading Program, a capped market-based system for certain combustion sources in covered upwind States to bring sources covered by any final section 126 finding into compliance. This type of program is a proven method for achieving the highly cost-effective emissions reductions described above while providing sources compliance flexibility. (See SNPR for $NO_X$ SIP call at 63 FR 25918–19, discussing OTAG's conclusions concerning advantages of market-based systems).

The Federal $NO_X$ Budget Trading Program would be triggered automatically if EPA makes a final finding as to any sources under section 126, as described in Section II.F. Participation in the Federal program would be mandatory for all sources affected by a triggering of this section 126 remedy. It would also be mandatory for all sources required to reduce emissions by the promulgated FIP, with the exception of cement kilns and internal combustion engines.

The EPA would like to clarify that the use of the term ''budget'' in the context of the Federal $NO_X$ Budget Trading Program does not mean that there is an aggregate emissions level that is enforceable for the purposes of the section 126 remedy. Rather, the term refers to the aggregate emission levels in each State for units required to participate in the Federal $NO_X$ Budget Trading Program as a section 126 remedy or as part of a FIP. The aggregation of sources allocations is initially only for purposes of determining the total amount available for allocation and and should not be construed to represent a separate requirement for sources in the program for purposes of any section 126 remedy.

The Federal $NO_X$ Budget Trading Rule is proposed in a new Part 97 in Title 40 of the Code of Federal Regulations. Because EPA is proposing to implement the Federal $NO_X$ Budget Trading Program both in response to the section 126 petitions and as part of a FIP if necessary; EPA intends to finalize part 97 in whichever of these actions is finalized first. (The EPA expects part 97 will be finalized in the section 126 rulemaking because final action on the remedy portion of section 126 is required by April 30, 1999 under the proposed consent decree discussed above.) In finalizing part 97, EPA intends to respond to the comments it receives regarding part 97 through both the proposed section 126 remedy and the proposed FIP. Therefore, commenters who have identical comments in both rulemakings may submit their comments to one docket and merely reference such comments in their submission to the other docket. However, to the extent comments on part 97 are solely related to how it would be applied through a triggering of the section 126 remedy, commenters should submit such comments to the docket for this proposed section 126 remedy.

#### 2. Relationship of the Section 126 Remedy to the $NO_X$ SIP Call and the FIP.

The sources or groups of sources identified in the section 126 petitions are also sources for which EPA recommends States adopt emission limitations and control strategies in response to the $NO_X$ SIP call. The $NO_X$ SIP call establishes an emissions budget for all sources of $NO_X$ emissions in all States determined by EPA to significantly contribute to nonattainment or interfere with maintenance of the ozone NAAQS in any other jurisdiction. The FIP sets specific stationary source rules to decrease $NO_X$ emissions and meet the $NO_X$ SIP call budget. The section 126 proposed action, on the other hand, is limited to major stationary sources or groups of stationary sources that are named in the section 126 petitions and that EPA finds emit or would emit in violation of the prohibition in section 110(a)(2)(D)(i) relative to a petitioning State. Despite this difference in the scope of the proposed section 126 action and the proposed FIP or final $NO_X$ SIP call, all three actions are aimed at reducing the transport of ozone by controlling emissions from sources in a given State that are found to be contributing significantly to nonattainment or maintenance problems in another State.

The EPA has promulgated the State $NO_X$ Budget Trading Program, a cap-and-trade program for large combustion sources, to assist States in meeting their obligations under the final $NO_X$ SIP call. The EPA believes that this State $NO_X$ Budget Trading Program—if selected by States to meet their SIP call obligations—could be coordinated and integrated with the Federal $NO_X$ Budget Trading Program promulgated in a section 126 rule or a FIP, in order to address the transport problem on a regional scale.

Integration is possible because, as noted above, both the $NO_X$ SIP call, the corresponding FIP, and the section 126 petitions seek to mitigate the ozone transport problem by reducing emissions from upwind sources that hinder attainment or maintenance of the ozone NAAQS downwind. Further, the sources covered in the State $NO_X$ Budget Trading Program under the $NO_X$ SIP call include a majority of the sources named by petitioning States, and are identical in size and categorization to sources for which EPA proposes issue rules in the section 126 and FIP proposed actions.

In order to be eligible to participate in a cap-and-trade program, the EPA

believes that there are two principal criteria that sources must meet, as stated in the supplemental notice for the proposed $NO_X$ SIP call (62 FR 25923). The first criterion requires that sources be able to account accurately and consistently for all of their emissions in order to maintain emissions within a cap. The second criterion is the ability to identify a responsible party for each regulated source who would be accountable for demonstrating and ensuring compliance with the program's provisions. Assuming that these criteria are met, and consistent control levels are used in setting emission requirements for the covered sources, EPA supports the establishment of a common trading program among sources subject to a trading program under the $NO_X$ SIP call, a section 126 remedy, or a FIP among sources subject to a trading program under the $NO_X$ SIP call, a section 126 remedy or a FIP.

The resulting multi-state trading program could include all sources in States found to be significantly contributing to nonattainment or interfering with maintenance of the ozone standard in another State. Under this common trading program, sources subject to the Federal $NO_X$ Budget Trading Program under the section 126 rulemaking or the FIP, and sources in States choosing to participate in the State $NO_X$ Budget Trading Program in response to the $NO_X$ SIP call, could trade with one another under a $NO_X$ cap across participating States. The EPA's analyses in conjunction with the $NO_X$ SIP call exhibit that implementation of a single trading program with a uniform control level results in no significant changes in location of emissions reductions as compared to a non-trading scenario. Therefore, the common trading program will achieve the intended emissions reductions while providing flexibility and cost savings to the covered sources.

Integration of the trading programs reduces the possibility of inconsistent or conflicting deadlines or requirements, increases the potential cost savings for sources, and streamlines program administration. Inconsistency could hamper the sources' ability to plan and achieve the needed reductions as cost-effectively as possible. In addition, if a State subsequently elects to submit a SIP including a trading program after EPA has already established a Federal $NO_X$ Budget Trading Program under a FIP or section 126 remedy, disruptions to sources that would shift from regulation under a FIP or section 126 remedy to regulation under a SIP would be minimized.

Because sources may be included in the common trading program through one of three possible mechanisms, the sources included in the trading program for purposes of the $NO_X$ SIP call may vary from sources included for purposes of the section 126 remedy. The EPA does not foresee this to be problematic since sources would face consistent control requirements regardless of which rulemaking includes the sources in the common trading program. That the requirements would be consistent follows from the similar nature of the rulemakings and the comparable level of control which EPA has determined to be cost-effective for each source category across all three actions.

The EPA proposes in part 97 to establish the geographic boundaries of the common trading program as those States submitting SIPs in response to the final $NO_X$ SIP call or subject to FIPs and/or the sources in States for which EPA makes a finding for the section 126 petitions. The EPA would administer this common trading program in collaboration with affected States.

The EPA is proposing a Federal $NO_X$ Budget Trading Program as part of the FIP or section 126 remedy which mirrors, to the extent feasible, the State $NO_X$ Budget Trading Program (set forth in part 96) which is the model trading program that is available for States to adopt in response to the $NO_X$ SIP call. While EPA is proposing to keep the programs as similar as possible, there are several differences which are more fully described below. These differences arise primarily from the need for Federal implementation of the program rather than State implementation. For example, EPA must determine the $NO_X$ allowance allocations for each unit in the Federal $NO_X$ Budget Trading Program, rather than simply provide an example that States may use to determine allocations, as is the case in the State $NO_X$ Budget Trading Program.

### *B. Federal $NO_X$ Budget Trading Program*

#### 1. Program Overview

In part 97, the EPA proposes a cap-and-trade program as an aggregate remedy for the section 126 petitions which it today proposes to determine are technically valid. Four of the eight petitioning States (New York, Connecticut, Pennsylvania, and Maine) requested that EPA establish such a trading program to implement the required reductions.

The EPA has authority under section 126 to require sources or groups of sources for which a finding of significant contribution is made to comply with a cap-and-trade program. Section 126(c) provides that such sources or groups of sources may continue to operate if they comply ''with such emission limitations and compliance schedules (containing increments of progress) as may be provided by the Administrator to bring about compliance'' with section 110(a)(2)(D). Under section 302, an ''emission limitation'' is ''a requirement * * * which limits the quantity, rate, or concentration of emission of air pollutants on a continuous basis.'' In fact, title IV of the CAA refers to the allowance requirements of the Acid Rain $SO_2$ cap-and-trade program as ''emission limitations.'' 42 U.S.C. 7651c(a).

Under a cap-and-trade program, the Administrator sets an emission limitation and compliance schedule for each unit subject to the program. The emission limitation for each unit is the requirement that the quantity of the unit's emissions during a specified period (here, the tonnage of $NO_X$ emissions during the ozone season) cannot exceed the amount authorized by the allowances (here, $NO_X$ allowances, each authorizing one ton of emissions) that the unit holds. Allowances are allocated to units subject to the program, and the total number of allowances allocated to all such units for each control period is fixed or capped at a specified level. The compliance schedule is set by establishing a deadline by which units must begin to comply with the requirement to hold allowances sufficient to cover emissions. In essence, for purposes of complying with section 126, EPA would be translating emission limits into allowance requirements. Since under section 126 EPA has the authority to establish emission limits, and allowance requirements are equivalent to emission limits, EPA has the authority to promulgate allowance requirements and allocate allowances for purposes of section 126. Since a cap-and-trade program is a compliance mechanism which enables sources to make cost-effective decisions to meet their allowance requirements, which are equivalent to emission limits, EPA believes it has the authority under section 126(c) to adopt a cap-and-trade program as a cost effective means of implementing the requirements of sections 126 and 110(a)(2)(D).

Sources potentially subject to the emission limitations and compliance schedule in the Federal $NO_X$ Budget Trading Program for the purposes of the section 126 petitions are those sources named by petitioning States and found by EPA to be emitting in violation of the prohibition in a petitioning State. The

section 126 remedy will apply to these sources in States for which a finding is triggered by the terms of today's proposed rule. For the reasons discussed in Section II, these sources include any fossil fuel-fired unit (boiler, turbine, or combined cycle) that serves a generator with a nameplate capacity greater than 25 MWe, and any fossil fuel-fired unit (boiler, turbine, or combined cycle) that has a maximum design heat input of greater than 250 mmBtu/hr, located in any of the following twenty States: Alabama, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, and West Virginia.

The EPA requests comment as to whether additional stationary sources that emit to a stack, can monitor $NO_X$ mass emissions, and are located in a State where a finding is made under section 126, but are not named in a petition, should be able to voluntarily participate in the trading program. In today's notice, EPA proposes providing these individual stationary sources the opportunity to opt in to enable further cost savings from the Federal $NO_X$ Budget Trading Program. These opt-in provisions would be very similar to the opt-in provisions allowed under the State $NO_X$ Budget Trading Program in part 96 (see Section III.B.3.e for explanation).

The $NO_X$ allowances—each allowance representing a limited authorization to emit one ton of $NO_X$—would be the currency used in the trading program. A fixed number of $NO_X$ allowances would be allocated to sources for each ozone season equal to the total amount of the aggregate emissions permitted among the sources in each State included in the Federal $NO_X$ Budget Trading Program for purposes of the section 126 remedy. The EPA has included in today's proposal several alternative methodologies that EPA could use to allocate $NO_X$ allowances to units. Appendix A proposed part 97 sets forth the allocation for each unit based on the proposed methodologies.

The control period for the trading program (i.e., the period during which a source must hold sufficient $NO_X$ allowances to cover emissions) would extend from May 1 through September 30, which is the same as the control period under the $NO_X$ SIP call and the FIP proposal. The EPA's proposed trading program remedy is based on the application of a uniform control level to the covered universe of sources. Based on analyses done in connection with the proposed $NO_X$ SIP call (63 FR 25921) and the final $NO_X$ SIP call, EPA maintains that trading could occur across States included in a $NO_X$ Budget Trading Program without restrictions, other than the requirement to comply with existing emission limits under title I and title IV of the CAA, as well as any other State limitations.

Under today's proposed rule, sources in the Federal $NO_X$ Budget Trading Program would be required to monitor and report their emissions in accordance with relevant portions of 40 CFR part 75. The EPA has promulgated revisions to part 75 that establish $NO_X$ mass monitoring requirements and provide greater flexibility to regulated sources. Consistent and accurate monitoring of emissions is necessary for accountability regarding compliance with the requirement to hold $NO_X$ allowances and to ensure that a ton of emissions attributed to one source in one State is equivalent to a ton attributed to another source in the same or another State.

Under today's proposed rule, EPA would be responsible for all aspects of program implementation, with the exception of permitting. Permitting would be handled by States in accordance with the requirements of the proposed rule. As further explained in Section III.B.2.c., the Federal $NO_X$ Budget Trading Program does not require a new or separate permit. If a source already has in place a federally enforceable permit, either title V or non-title V, the source's trading program obligations must be incorporated into this permit; if a source does not have a federally enforceable permit, the federally-enforceable $NO_X$ Budget Trading Rule applies to the source on its own accord.

As discussed herein, EPA proposes to make the Federal and State $NO_X$ Budget Trading Programs as similar as possible and has modeled proposed part 97 after part 96 just finalized. The EPA notes that discussion of the evolution of the $NO_X$ Budget Trading Program is set forth in the supplemental notice of the proposed $NO_X$ SIP call rule at 63 FR 25921–23 and in the final $NO_X$ SIP call rule.

2. Elements of the Federal $NO_X$ Budget Trading Program That Are the Same as the State $NO_X$ Budget Trading Program

Under part 97, as proposed, the following sections would be virtually identical to the corresponding sections in part 96, which sets forth the State $NO_X$ Budget Trading Program. The EPA proposes to retain and rely on the analyses and considerations undertaken in the $NO_X$ SIP call process to determine these program elements. Moreover, the provisions in part 97 would be numbered in the same sequence as the corresponding provisions in part 96, so that, for example, § 97.2 and § 96.2 or § 97.81 and § 96.81 would address the same subject matter. The major differences between the part 97 sections listed below and their corresponding part 96 sections would be the renumbering of cross references to other regulatory provisions so that a section in part 97 would reference the appropriate section in that part, as opposed to the section in part 96. More detailed information on the rationale for the part 96 provisions themselves can be found in the preamble accompanying the proposed part 96 (63 FR 25917–43) and the final part 96.

**Subpart A—Federal $NO_X$ Budget Trading Program General Provisions**

Sec.
97.3 Measurements, abbreviations, and acronyms.
97.5 Retired unit exemption.
97.7 Computation of time.

**Subpart B—Authorized Account Representative for $NO_X$ Budget Sources**

97.10 Authorization and responsibilities of the $NO_X$ authorized account representative.
97.11 Alternate $NO_X$ authorized account representative.
97.12 Changing the $NO_X$ authorized account representative and alternate $NO_X$ authorized account representative; changes in the owners and operators.
97.13 Account certificate of representation.
97.14 Objections concerning the $NO_X$ authorized account representative.

**Subpart C—Permits**

97.20 General $NO_X$ Budget permit requirements.
97.21 Submission of $NO_X$ Budget permit applications.
97.22 Information requirements for $NO_X$ Budget permit applications.
97.23 $NO_X$ Budget permit contents.
97.24 Effective date of initial $NO_X$ Budget permit.
97.25 $NO_X$ Budget permit revisions.

**Subpart D—Compliance Certification**

97.30 Compliance certification report.

**Subpart F—$NO_X$ Allowance Tracking System**

97.50 $NO_X$ Allowance Tracking System accounts.
97.51 Establishment of accounts.
97.52 $NO_X$ Allowance Tracking System responsibilities of $NO_X$ authorized account representative.
97.53 Recordation of $NO_X$ allowance allocations.
97.54 Compliance.
97.55 Banking.
97.56 Account error.
97.57 Closing of general accounts.

**Subpart G—$NO_X$ Allowance Transfers**

97.60 Scope and submission of $NO_X$ allowance transfers.
97.61 EPA recordation.
97.62 Notification.

The EPA requests comment on whether any of the part 97 provisions listed above should differ substantively from the corresponding provisions in part 96. If a commenter believes substantive differences in the rules are appropriate, the commenter should describe the favored changes and explain why these changes are appropriate.

a. General Provisions. For part 97, EPA is proposing to use the same measurements, abbreviations, and acronyms, the same retired unit exemption, and the same provisions for computation of time as those that apply in part 96, with cross references to the appropriate sections in part 97, rather than to sections in part 96. The EPA is proposing these part 97 provisions for the reasons set forth both in the proposed $NO_X$ SIP call (63 FR 25923–27) and final $NO_X$ SIP call, and in order to minimize differences between the Federal and State $NO_X$ Budget Trading Programs.

b. Authorized Account Representative. The $NO_X$ Authorized Account Representative ($NO_X$ AAR) is the individual who is authorized to represent the owners and operators of each $NO_X$ Budget unit at a $NO_X$ Budget source in matters pertaining to the $NO_X$ Budget Trading Program. Subpart B of part 97 addresses, among other things, the process for designating and changing the $NO_X$ AAR and the responsibilities of the $NO_X$ AAR and alternate $NO_X$ AAR. These provisions are the same as those in part 96, with cross references to the appropriate sections of part 97. The EPA is proposing these part 97 provisions for the reasons set forth both in the proposed $NO_X$ SIP call (63 FR 25927) and the final $NO_X$ SIP call, and in order to minimize differences between the Federal and State $NO_X$ Budget Trading Programs.

c. Permits. The regulations governing State permitting under title V define an ''applicable requirement,'' which must be reflected in a title V operating permit, as including ''[a]ny standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the CAA that implements the relevant requirements of the CAA, including any revisions to that plan promulgated in part 52 of this chapter.'' 40 CFR 70.2. Since today's proposed rule is being promulgated under title I (i.e., under section 126), the requirements of this rule are applicable requirements under § 70.2 and must be reflected in the title V operating permit of $NO_X$ Budget sources required to have such a permit. The EPA believes that the majority of $NO_X$ Budget sources will be required to have a title V permit. Further, all State and local air permitting authorities currently have EPA-approved title V operating permits programs. These State and local agencies would be the permitting authorities for the majority of $NO_X$ Budget sources with title V permits, for which the trading program requirements would be applicable requirements. For any sources that do not have a title V permit, such a permit is not required. If a source has a federally enforceable non-title V permit, the trading program requirements must also be incorporated into this permit. If a source does not have a federally enforceable permit, the requirements of the Federal $NO_X$ Budget Trading Rule would be federally enforceable without the federally enforceable permit.

Subpart C of part 97 addresses, among other things, the administration of a permit, permit applications, permit contents, effective date, and permit revisions. These provisions are the same as those in part 96, with cross references to the appropriate sections in part 97. The EPA is proposing these part 97 provisions for the reasons set forth both in the proposed $NO_X$ SIP call (63 FR 25927–29) and the final $NO_X$ SIP call, and in order to minimize differences between the Federal and State $NO_X$ Budget Trading Programs.

d. Compliance Certification. The $NO_X$ AAR must certify at the end of each control period that the unit was in compliance with the emissions limitation and other requirements of the Federal $NO_X$ Budget Trading Program. Proposed § 97.30 sets forth the same provisions for compliance certification reports as those in part 96, with cross references to the appropriate sections in part 97. The EPA is proposing these part 97 provisions for the reasons set forth both in the proposed $NO_X$ SIP call (63 FR 25929) and the final $NO_X$ SIP call, and in order to minimize differences between the Federal and State $NO_X$ Budget Trading Programs.

e. $NO_X$ Allowance Tracking System. The $NO_X$ Allowance Tracking System is an automated system used to track $NO_X$ allowances held by $NO_X$ Budget units under the $NO_X$ Budget Trading Program, as well as those allowances held by other organizations and individuals. Subpart F of part 97 addresses, among other things, $NO_X$ allowance tracking system accounts, the account responsibilities of the $NO_X$ AAR, the recordation of $NO_X$ allowance allocations, the compliance process, account error, and account closing. These provisions are the same as those in part 96, with cross references to the appropriate sections in part 97. The EPA is proposing these part 97 provisions for the reasons set forth both in the proposed $NO_X$ SIP call (63 FR 25933–37) and the final $NO_X$ SIP call, and in order to minimize differences between the Federal and State $NO_X$ Budget Trading Programs.

f. Banking. The EPA proposes to include banking as a feature in the Federal $NO_X$ Budget Trading Program for the reasons set forth in the final $NO_X$ SIP call. Proposed § 97.55 sets forth the same provisions for banking and the management of banked allowances as specified in part 96. In accordance with these provisions, $NO_X$ allowances held by units subject to the Federal $NO_X$ Budget Trading Program may be banked for future use starting in 2003 (except as noted in Section III.B.3.e.ii. of this preamble). However, as in the State $NO_X$ Budget Trading Program, the Federal $NO_X$ Budget Trading Program contains a flow control mechanism to limit the variability associated with banking. This mechanism allows unlimited banking by units subject to the Federal $NO_X$ Budget Trading Program, but discourages the ''excessive'' use of banked allowances by establishing a discount rate on the use of banked allowances over a certain level. Proposed part § 97.55 establishes a flow control mechanism which applies a 2-for-1 discount ratio to the use of banked allowances above a certain level when the total number of banked allowances in the program exceeds 10 percent of the allowable $NO_X$ emissions for all sources covered by the Federal trading program. This flow control mechanism, along with the overall banking provisions, is proposed for the reasons set forth in both the proposed $NO_X$ SIP call (63 FR 25934–37) and the final $NO_X$ SIP call, and in order to minimize differences between the Federal and State $NO_X$ Budget Trading Programs.

g. $NO_X$ Allowance Transfers. Subpart G of part 97 addresses, among other things, submission, recordation, and notification of transfers of $NO_X$ allowances under the $NO_X$ Budget Trading Program. These provisions are the same as those in part 96, with cross references to the appropriate sections in part 97. The EPA is proposing these part 97 provisions for the reasons set forth both in the proposed $NO_X$ SIP call (63 FR 25937–38) and the final $NO_X$ SIP call, and in order to minimize

differences between the Federal and State $NO_X$ Budget Trading Programs.

h. Audits. While program audits are not explicitly required by today's rule, EPA intends to perform the same types of audits discussed concerning the proposed $NO_X$ SIP call (63 FR 25942) and the final $NO_X$ SIP call.

3. Elements of the Federal $NO_X$ Budget Trading Program That Differ From the State $NO_X$ Budget Trading Program

The EPA proposes that the following sections in part 97 incorporate certain differences from the corresponding sections in part 96 to provide for Federal implementation of the $NO_X$ Budget Trading Program.

**Subpart A—Federal $NO_X$ Budget Trading Program General Provisions**

Sec. 97.1 Purpose.
Sec. 97.2 Definitions.
Sec. 97.4 Applicability.
Sec. 97.6 Standard Requirements.

**Subpart D—Compliance Certification**

Sec. 97.31 Administrator's action on compliance certifications.

**Subpart E—$NO_X$ Allowance Allocations**

Sec. 97.40 Trading program budget.
Sec. 97.41 Timing requirements for $NO_X$ allowance allocations.
Sec. 97.42 $NO_X$ allowance allocations.

**Subpart H—Monitoring and Reporting**

Sec. 97.70 General requirements.
Sec. 97.71 Initial certification and recertification procedures.
Sec. 97.72 Out of control periods.
Sec. 97.73 Notifications.
Sec. 97.74 Recordkeeping and reporting.
Sec. 97.75 Petitions.
Sec. 97.76 Additional requirements to provide data for allocations purposes.

**Subpart I—Individual Unit Opt-Ins**

Sec. 97.80 Applicability.
Sec. 97.81 General.
Sec. 97.82 $NO_X$ authorized account representative.
Sec. 97.83 Applying for $NO_X$ Budget opt-in permit.
Sec. 97.84 Opt-in process.
Sec. 97.85 $NO_X$ Budget opt-in permit contents.
Sec. 97.86 Withdrawal from $NO_X$ Budget Trading Program.
Sec. 97.87 Change in regulatory status.
Sec. 97.88 $NO_X$ allowance allocations to opt-in units.

a. General Provisions. i. Purpose. Proposed Sec. 97.1 explains that proposed part 97 sets forth the provisions for the Federal $NO_X$ Budget Trading Program addressing interstate transport of ozone and $NO_X$. As discussed above, this program would be activated either under section 126 or under a FIP.

ii. Definitions. For part 97, EPA is proposing to use the same definitions as those that apply in part 96, with cross references to the appropriate sections in part 97, with three exceptions. First, the definition of the term ''$NO_X$ Budget Trading Program'' would be altered to reflect the fact that the Federal trading program is established pursuant to part 52, as opposed to part 51.121, as is the case with the State $NO_X$ Budget Trading Program under part 96. Secondly, the definition for the term ''State'' would be altered to reference only those States that would be covered by any final section 126 or FIP action, and to reflect the fact that the Federal trading program would be promulgated for a State, as opposed to adopted by the State as is the case with the State $NO_X$ Budget Trading Program. Last, the term ''State trading program budget'' would be replaced with the term ''trading program budget''. For purposes of the FIP, the trading program budget would be the aggregated budget for all sources affected by the requirements to participate in the trading program in a given State under the FIP. For purposes of the section 126 action, the trading program budget would be referred to as the ''section 126 trading program budget for the State''. The term ''section 126 trading program budget for the State'' is used to clarify the fact that the budget for the Federal $NO_X$ Budget Trading Program is not aggregated to a State level for the purposes of the section 126 action except for the allocation calculation, since the focus in the remedy is sources rather than States.

The following example illustrates the approach taken concerning the unchanged definitions: the term ''$NO_X$ Budget Unit'' is defined under part 97 as ''a unit that is subject to the $NO_X$ Budget Trading Program emissions limitation under Sec. 97.4 and Sec. 97.80'', while that term has the same definition under part 96 except that appropriate sections in part 96 are referenced (63 FR 25923).

iii. Applicability. For the reasons discussed above, EPA proposes in part 97 that the Federal $NO_X$ Budget Trading Program for purposes of the section 126 remedy would apply to any fossil fuel-fired unit (boiler, combustion turbine, or combined cycle) that serves a generator with a nameplate capacity greater than 25 MWe, and any fossil fuel-fired unit (boiler, combustion turbine, or combined cycle) that has a maximum design heat input of greater than 250 mmBtu/hr, located in any of the following twenty States: Alabama, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, and West Virginia. The remedy will apply to these sources in those States for which EPA makes a final finding granting a section 126 petition under the triggers included in the proposed rule. These are the same source categories included in the core group applicability for the voluntary State $NO_X$ Budget Trading Program, only in a more narrow range of States.

In the $NO_X$ SIP call, EPA offered States the option of allowing units with a very low federally enforceable permit limitation (i.e., 25 tons per season) to be exempt from the trading program, even though they were above the applicability threshold (63 FR 25926). The EPA proposes to include this provision in the Federal $NO_X$ Budget Trading Program and solicits comment on the appropriateness of such inclusion.

iv. Standard Requirements. Under the Federal $NO_X$ Budget Trading Program, the $NO_X$ Budget units and their owners, operators, and $NO_X$ AARs must meet certain standard requirements that incorporate the full range of program requirements by referencing other sections of the $NO_X$ Budget Trading Rule. These provisions are the same as the related provisions in part 96, with cross references to the appropriate sections of part 97, except that the Administrator, rather than the permitting authority, would allocate $NO_X$ allowances under the Federal $NO_X$ Budget Trading Program. This reflects the fact that the $NO_X$ Budget Trading Program would be Federally run, rather than run by the State as under the $NO_X$ SIP call.

b. Compliance Certification. Proposed § 97.31 is the same as § 96.31 except that the Administrator has the sole responsibility for reviewing and auditing compliance certifications and other submissions under the Federal $NO_X$ Budget Trading Program. This reflects the fact that the part 97 $NO_X$ Budget Trading Program would be federally run rather than run by the State as under the $NO_X$ SIP call. The EPA is proposing these part 97 provisions for the reasons set forth both in the proposed $NO_X$ SIP call (63 FR 25929) and the final $NO_X$ SIP call, and in order to minimize differences between the Federal and State $NO_X$ Budget Trading Programs.

c. Aggregate $NO_X$ Emissions Levels and Allowance Allocations. This section discusses the calculation of State specific aggregate emission levels and the methodology and timing for issuance of $NO_X$ Budget unit allocations. The EPA calculated the State specific aggregate emission levels that would remain after the application of reasonable and highly cost-effective

$NO_X$ controls to upwind sources which contribute significantly to nonattainment or maintenance problems in downwind States. These aggregate emission levels for each State for which a finding under section 126 may be triggered are listed in appendix C of today's notice for both EGUs and non-EGUs. Section II.C of this preamble describes the controls that were assumed for each subcategory of sources. In determining what controls to assume in calculation of the proposed emissions level for each subcategory, EPA used the cost-effectiveness rationale also described in Section II.C.

The EPA also calculated individual unit allocations based on the State specific aggregate emission levels described in this section. Subpart E of today's proposed Federal $NO_X$ Budget Trading Rule addresses the allocation of $NO_X$ allowances to $NO_X$ budget units for purposes of the section 126 remedy. As in the allocation-related provisions in part 96, part 97 includes provisions for the timing of allocation issuance, the methodology for issuing allocations, and the allocations for new sources. However, in part 97, the Administrator, rather than the State, will determine the allocations.

i. Data Sources. (1) EGUs. The EGU data base developed for this analysis consists of both utility EGUs and non-utility EGUs. The non-utility EGUs include independent power producers (IPPs) and non-utility generators (NUGs). Eight data sources were used to develop the base year EGU data: (1) EPA's Acid Rain Data Base (ARDB) (Pechan, 1997c); (2) EPA's 2007 Integrated Planning Model (IPM) Year 2007; (3) EPA's Emission Tracking System/Continuous Emissions Monitoring System (ETS/CEM) (EPA, 1997b); (4) DOE's Form EIA–860 (DOE, 1995a); (5) DOE's Form EIA–767 (DOE, 1995b); (6) EPA's National Emissions Trends Data Base (NET) (EPA, 1997c); (7) DOE's Form EIA–867 (DOE, 1995c); (8) the OTAG Emission Inventory (Pechan, 1997a); and (9) incorporation of comments to the proposed $NO_X$ SIP call NPR dated November 7, 1997. More details regarding these data sources can be found in the technical support document (TSD) of EPA's $NO_X$ SIP call.

(2) Non-EGUs. The starting point for the non-EGU data base was the 1990 OTAG Inventory. This inventory was prepared with 1990 State ozone SIP emission inventories supplemented with either State inventory data, if available, or EPA's National Emission Trends (NET) data if State data were not available. This inventory was further refined by the incorporation of comments to the proposed $NO_X$ SIP call NPR dated November 7, 1997. All records with utility SCCs (first 3 digits 101 or 201) were removed from the 1990 OTAG Inventory because it was assumed that emissions from these sources would be accounted for in the EGU component of the inventory. More details regarding these data sources can be found in the TSD of EPA's $NO_X$ SIP call.

ii. Methodology Used To Determine Controlled Emission Levels. Section II of this preamble identifies the two subcategories that EPA proposes to control (i.e., large EGUs and large non-EGUs) and the emission levels that are highly cost-effective to achieve (i.e., 0.15 lb/mmBtu for EGUs and 60 percent reduction from uncontrolled levels for non-EGUs) in response to the section 126 petitions. This section describes the methodology used in determining each of these subcategory's emissions level on a State-by-State basis.

(1) Large EGUs. For reasons explained in the final $NO_X$ SIP call, EPA is proposing to calculate each State's summer season large EGU emissions level using a specific $NO_X$ emission rate and the projected summer season utilization of the year 2007. Specifically, EPA proposes calculating each State's large EGU $NO_X$ emissions level by multiplying: (1) Each State's summer activity level in mmBtu (EPA selected the higher of each State's overall 1995 or 1996 summer utilization), by (2) each State's projected growth between 1996 and 2007 (using the IPM model), by (3) a $NO_X$ rate of 0.15 lb/mmBtu. The resulting figure, in lbs, was divided by 2000 (lbs per ton) to determine tons.

In general, new units built to meet economic growth are lower emitting than the older units they augment or replace. Thus, though the industry's fuel utilization may increase over time, the industry's average $NO_X$ rate may decrease as newer, cleaner units are built and operated, and total emissions may or may not increase.

The EPA proposes to incorporate growth in industrial activity when determining the large EGU emissions level, and thus accommodate new sources into the section 126 remedy. Specifically, EPA projects each State's projected change in utilization from current levels to the year 2007 and sets an emissions level based on that future year's utilization. This approach directly accommodates industrial growth. Additionally, this was the type of approach taken in the final $NO_X$ SIP call in determining various State emissions levels. Thus, EPA is proposing to use this type of approach for addressing activity growth and, as described below, using the IPM growth projections. Appendix C of proposed part 97 of this notice presents the resulting proposed large EGU emissions level per State along with each State's projected growth from 1996 to 2007.

(2) Large Non-EGUs. For reasons explained in the final $NO_X$ SIP call, EPA is proposing to calculate each State's summer season large non-EGU emissions level by reducing each State's uncontrolled non-EGU $NO_X$ emissions levels (in tons) by 60 percent and assuming growth through the year 2007. Appendix C of proposed part 97 presents the resulting large non-EGU emissions level and projected growth rate for each State.

iii. Development of Section 126 Trading Program Budget. Proposed § 97.40 provides that the section 126 trading program budget for each State would equal the sum of the aggregate emission levels for large electric generating units and large non-electric generating units in each State calculated as discussed in Section III.B.3.c.ii of this preamble. Under section 126, the Administrator determines the ''emission limitations and compliance schedules'' with which $NO_X$ Budget units under § 97.4 must comply. In the Federal $NO_X$ Budget Trading Program being proposed for the section 126 remedy, these $NO_X$ ''emission limitations'' take the form of $NO_X$ ''allowance allocations'' and are assigned based on the aggregate emission levels for the subcategories in the trading program. The approach to issuing allocations under a section 126 action is similar to that under the $NO_X$ SIP call, with the exception that under § 96.40, the State permitting authority, rather than the Administrator, determines, through the SIP, the total amount of allowable $NO_X$ emissions apportioned to $NO_X$ Budget units.

iv. Timing Provisions. Proposed § 97.41 sets forth the provisions for when the Administrator will issue allocations of $NO_X$ allowances to $NO_X$ Budget units. Under the Federal $NO_X$ Budget Trading Program, the Administrator (rather than the State permitting authority) determines the $NO_X$ allowance allocations, as well as records them in the $NO_X$ Allowance Tracking System. Thus, proposed § 97.41 does not provide, or set deadlines, for the permitting authority's submission of allocations to EPA. However, as discussed in the final $NO_X$ SIP call, EPA believes it is important to issue the allocations at least a couple years into the future to provide some predictability for sources in their control planning and build confidence in the market. Therefore, under part 97, the Administrator will issue $NO_X$ allowances in EPA's $NO_X$ Allowance

Tracking System (NATS) by April 1 of every year for the control period that is three years later. For example, EPA would issue the allocations for the 2003 control period by April 1, 2000, for those sources for which a finding has been triggered under section 126 at this time. For those sources for which a finding is not triggered by April 1, 2000, but for which a final finding is automatically triggered on May 1, 2000, EPA would issue the allocations for the 2003 control period to NATS as soon as practicable in the year 2000, consistent with the allocations finalized with this rulemaking. In both cases, EPA would issue the allocations for the 2004 control period by April 1, 2001, etc. so that the allocations are always known three years in advance. These provisions are consistent with the minimum timing requirements specified in the final $NO_X$ SIP call rulemaking.

As stated in the previous paragraph, EPA will issue allocations in the NATS on an annual basis three years prior to the relevant control period. However, EPA proposes to use the same allocations for the first three years of the program (based upon one of the proposed methodologies described below), unless a State replaces the section 126 action with its own allocations in an approved SIP. The EPA proposes constant allocations for the first three control periods to provide more consistency and certainty and to build market confidence during the start-up phase of the program. Therefore, while the Agency will not record the allocations in unit accounts until April 1 of the year three years preceding each relevant control period, the allocations for 2004 and 2005 will be the same as the allocations for the 2003 control period. However, if a State, as part of an approved SIP, submits allocations for the 2004 control period to EPA prior to April 1, 2001, or for the 2005 control period prior to April 1, 2002, the State's allocations will replace the allocations EPA planned to issue for the relevant control season. By issuing allocations into accounts one year at a time, EPA is providing States the ability to replace a section 126 action with an approved SIP while still ensuring that sources receive allocations at least three years prior to the relevant control season.

After the initial three year period, EPA may update its allocations on an annual basis three years prior to the relevant control season. As discussed in the final $NO_X$ SIP call, updating allocations on an annual basis (three years ahead) is intended to allow the allocation system to accommodate changes in market conditions.

The EPA is proposing these part 97 provisions for the reasons set forth in the final $NO_X$ SIP call concerning part 96 and in order to minimize differences between the Federal and State $NO_X$ Budget Trading Programs.

v. $NO_X$ Allowance Allocation Methodology. The EPA proposes that part 97 include the methodology that the Administrator will use for allocating $NO_X$ allowances to $NO_X$ Budget units. While in part 96 the Agency lays out an optional allocation methodology that may be used by a State permitting authority for issuing allocations, part 97 will prescribe the methodology that the Administrator would use.

(1) EGUs. The EPA requests comment on three separate methodologies that the Administrator could use for the initial allocation period (the control periods in 2003 through 2005) for electricity generating units. In whichever of these methodologies the Agency finalizes, the total number of allowances issued would equal the portion of the section 126 trading program budget in each State attributed to large electricity generating units (calculated as described in Section III.B.3.c.ii of this preamble by multiplying a specified emission rate by a State's summer activity level projected to 2007). The first option is to allocate allowances based on the product of an emission rate in pounds of $NO_X$/mmBtu and the mmBtus of energy utilized for all units in the Federal $NO_X$ Budget Trading Program; the proposed part 97 describes this approach. The second option is to allocate allowances to fossil-fuel-fired electric generating units in the Federal $NO_X$ Budget Trading Program based on the product of an emission rate in pounds of $NO_X$/kWh and the kWh of electricity generated. A third option considered by EPA would allocate allowances to all large electric generating units, regardless of fuel type, in the States affected by the section 126 rulemaking based on their electricity generated. For the second and third options, EPA would use a surrogate for electricity generation data where electricity generation data is not available. The EPA solicits comment on these three methodologies.

With regard to the allocation methodology to be used by the Administrator for the control periods starting in 2006, EPA requests comment on the same three general methodologies mentioned in the previous paragraph. To facilitate the use of the second and third approaches for the control periods in 2006 and thereafter, EPA proposes to work with stakeholders to design a system based on electricity generation that could be used after the initial allocation period. The EPA plans to propose an allocation system based on electricity generation in 1999 and finalize the approach in 2000. Appropriate data could then be measured and collected at $NO_X$ Budget units during the control periods in the years 2001 and 2002. When it becomes available, this approach could be incorporated into part 97 if the Agency decides to allocate allowances based on electricity generation.

For whichever of these three allocation methods the Agency selects, EPA proposes to use the average of the data for the two highest control periods for the years 1995, 1996, and 1997 in determining an electric generating unit's allocation for the control periods in 2003, 2004, and 2005. This approach using data from 1995, 1996, and 1997 differs slightly from the way the aggregate emission level was calculated for the EGU subcategory. As explained in Section III.B.3.c.ii of this preamble, EPA calculated the aggregate emission level based upon the greater of the State heat input data from 1995 or 1996. However, the Agency believes it is useful to base the first three years of allocations to individual units on operating data reflecting the average of the highest of two out of the three most recent years. In this way, the initial allocations better represent the operation of particular units.

Once several years of allocations have been built into the system, the Agency believes it is possible to move to an annually updating allocation system that calculates allocations based on operating data from a single year. Using data from a single year as a basis for allocations enables the Agency to develop an updating allocation system that can reflect changes in utilization or electricity generation. By this time, the trading market should be more established and companies will have several years of experience with the program. Therefore, companies will better be able to accommodate variations in single year allocations through the trading market and company-wide compliance strategies. Therefore, after the initial period of allocations, EPA would use data measured during the control period of the year that is four years before the year for which allocations are being calculated.

Furthermore, for reasons discussed in the final $NO_X$ SIP call, EPA proposes the establishment of an allocation set-aside account for new units (units that commence operation during or after the period on which general $NO_X$ allowance allocations are based) to be used in whichever allocation methodology EPA adopts equaling 5 percent of the section

126 trading program budget in each State in 2003, 2004, and 2005 and 2 percent of the section 126 trading program budget in each State in the subsequent years. The Agency believes that if a new source set-aside is employed, it should be large enough to provide allocations to all new units entering the Federal trading program. Based on analyses EPA conducted using the Integrated Planning Model (IPM) and on the Agency's proposal to reallocate by April 1, 2003 for the control period in 2006, 5 percent appears to be a reasonable portion of $NO_X$ allowances to set-aside for new units in the initial three years of the program and 2 percent for the subsequent years.

However, while 5 percent (and 2 percent) may be an appropriate region-wide average, an individual State may experience either more or less growth in new sources during the relevant time period. The EPA calculated the State-specific aggregate emission levels for each subcategory using State-specific growth rates (see the rulemaking docket). Therefore, EPA solicits comment on using State-specific growth rates to determine the appropriate size of a State new source set-aside. Additionally, the 5 percent (and 2 percent) numbers were calculated based upon estimated growth in utilization by new sources and therefore may be more appropriate when the first proposed allocation methodology is employed. The EPA solicits comment on the use of a different percentage for the set-aside if the Agency adopts an electricity generation-based allocation system.

Using each of the three allocation methodologies on which EPA solicits comment, the Agency has calculated unit specific allocations. Two of the three sets of unit-specific allocations are in appendix A of proposed part 97, the third set is included in the rulemaking docket. The EPA is providing these unit specific allocations to solicit comment on the underlying data used in these allocations and the methodologies employed in determining the allocations. The Agency will select and describe a set of allocations for all sources potentially subject to the section 126 rulemaking in the final notice. The EPA would issue the finalized set of the 2003 control period allocations in the NATS by April 1, 2000 for those sources for which a finding has been triggered under section 126 at this time. For those sources for which a finding is not triggered by April 1, 2000, but for which a final finding is automatically triggered on May 1, 2000, EPA would issue the allocations for the 2003 control period to NATS as soon as practicable in the year 2000, consistent with the allocations finalized with this rulemaking.

For the first allocation approach in part 97, EPA determined initial unadjusted allocations to existing electric generating $NO_X$ Budget units by multiplying a $NO_X$ emission rate of 0.15 lb/mmBtu by the units' historical heat input calculated by taking the average of the heat input for the two highest control periods for the years 1995, 1996, and 1997. The Agency used the heat input data reported to EPA in quarterly reports during ozone season for utilities affected under the Acid Rain Program. For non-utility electricity generators, EPA used heat input information reported to EIA on EIA Form 867.

After determining the initial unadjusted unit allocations, EPA adjusted the allocation for each unit upward or downward to match the portion of the section 126 trading program budget in the State attributed to large electricity generating units. Then, the Agency adjusted the allocation for each unit in the State proportionately so that the total allocations equaled 95 percent of the portion of the section 126 trading program budget in the State attributed to large electricity generating units. This created a new source set-aside of 5 percent.

For the second allocation approach, EPA multiplied the unit heat input in mmBtu and the generator heat rate [14] associated with the generation for that unit, in Btu/kWh, to determine each unit's associated historical electrical generation in kWh.[15] For non-utility electricity generators, EPA used heat input from OTAG's database (1995 data) and the average heat rate values found below in Table III–1. The Agency used this indirect approach to calculate electrical output because EPA did not have access to unit-specific generation data for non-utility electricity generators. The EPA used average heat rate values for generators for which heat rates were not publicly available, as shown in the table below.

TABLE III–1.—AVERAGE UTILITY GENERATOR HEAT RATES

| Unit and fuel type | Generator size (MW) | Average heat rate (Btu/kWh) |
|---|---|---|
| Combustion Turbine (gas or No. 2 fuel oil/diesel). | ≤50 | 14250 |
| | >50 | 13200 |
| Combined Cycle Turbine (gas or No. 2 fuel oil/diesel). | ≤100 | 11100 |
| | >100 | 8500 |
| Oil-or Gas-fired Steam Boiler. | ≤400 | 10600 |
| | >400 | 10000 |
| Coal-fired Boiler ..... | ≤500 | 10400 |
| | >500 | 9800 |

Some units are cogenerators, which are electrical generators that divert part of their steam to provide steam output, rather than to generate electricity. The Agency calculated output from cogenerating units as described in the previous paragraph. That approach assumes that heat input is converted into electricity at a particular efficiency. The EPA's proposed approach does not account for the fact that steam generation is generally more efficient than electricity generation. The EPA encourages commenters to provide the Agency electrical output data and steam output data to determine the efficiency of cogenerating units.

To determine the individual unit allocations, EPA determined the total electricity generation from all affected electricity generating units within each State as estimated in the previous paragraphs and calculated each unit's share of the total State electricity generation. Each unit was then assigned an allocation based upon its share of electricity generation. For example, if the Agency calculated that a unit contributed 0.4 percent of a State's total electricity generation, then it would receive 0.4 percent of the section 126 trading program budget in the State attributed to large fossil-fuel-fired electricity generating units. After determining the initial unadjusted allocation, the Agency adjusted the allocation for each unit proportionately so that the total allocation equaled 95% of the portion of the section 126 trading program budget for the State attributed to large fossil-fuel-fired electricity generating units (to create the new source set-aside).

The EPA is also proposing a third allocation approach which would provide allowances to all electricity generators in the applicable region regardless of the energy source. For fossil fuel-fired power plants, EPA used the approach described above in determining the electrical generation

[14] Utilities report their generator-specific heat rates to EIA on EIA Form 860.

[15] The EPA used the average generation for the ozone season during the highest two of the years from 1995 through 1997, similar to the approach with heat input.

from individual combustion units. For nuclear power plants and hydroelectric plants, EPA used electrical generation reported by utilities to EIA on EIA Form 759. The Agency was unable to find data for all plants. The Agency solicits comment on these methods for determining electricity generation data. The EPA also requests comment on the data itself and solicits any additional information for the plants for which EPA has not found data.

The Agency determined the initial unadjusted allocations in the same manner as described for the electricity generation-based allocations to fossil-fuel-fired units only. That is, the Agency determined the total electricity generation within each State, calculated each unit's share of the total electricity generation, and calculated an allocation based upon that share of the section 126 trading program budget for the State attributed to large electricity generating units. The Agency then adjusted the allocation for each unit proportionately so that the total allocation equaled 95 percent of the portion of the section 126 trading program budget for the State attributed to large electricity generating units.

For each of these three allocation methodologies, the Agency solicits comment on the data used to determine the allocations. Electricity generators, and utilities in particular, already report many of these data to Federal or State government agencies. The necessary data and their sources include:

1. For each plant:

a. Plant name—as reported to U.S. EPA and EIA; if not currently reporting to Federal government, then as reported to the state environmental agency

b. ORISPL number, if available (or other unique identification number for the plant, if no ORISPL number exists)—as reported to U.S. EPA and EIA; if not currently reporting to Federal government, then as reported to the state environmental agency

iii. State postal abbreviation and county FIPS code as reported to U.S. EPA and EIA; if not currently reporting to Federal government, then as reported to the state environmental agency

iv. Monitoring locations at the plant (e.g., stacks or fuel pipes where monitoring equipment would be located) for existing monitoring equipment, as reported to U.S. EPA, or to the state environmental agency

2. For each unit (boiler or combustion turbine) at the plant:

a. An identification designation (e.g., 1, CT2) as reported to U.S. EPA and EIA; if not currently reporting to Federal government, then as reported to the state environmental agency

b. A description of each unit (e.g. combustion turbine, coal-fired wet-bottom boiler) as reported to U.S. EPA and EIA; if not currently reporting to Federal government, then as reported to the State environmental agency or state utility commission

c. Fuel or energy source used—as reported to the U.S. Energy Information Administration (EIA) or to the state utility commission

d. Heat input (mmBtu) in May 1 through September 30 of 1995, 1996 and 1997 as reported to U.S. EPA and EIA;

e. Estimated historical $NO_X$ mass emissions in May 1 through September 30 of 1995, 1996 and 1997 (as reported to the U.S. EPA or the state environmental agency).

3. For each electrical generator at the plant:

a. Generation identification designation—as reported to U.S. EPA and EIA; if not currently reporting to Federal government, then as reported to the state utility commission

b. Nameplate capacity in MWe-as reported to U.S. EPA and EIA; if not currently reporting to Federal government, then as reported to the state utility commission.

c. Electrical generation (MWh)in May 1 through September 30 of 1995, 1996 and 1997—as reported to EIA;

4. For each steam turbines at the plant that is used to generate steam output instead or in addition to electricity:

a. An identification designation

b. Capacity, in mmBtu/hr output rate

c. Steam output (mmBtu) (not used for electrical generation) in May 1 through September 30 of 1995, 1996 and 1997

The Agency believes these data are needed both to determine the output of each source and to establish a unique identity for each source and its units. The EPA requests comment on the specific data as well as the type of data supporting the proposed allocations under part 97.

(2) Non-EGUs. For any allocation methodology adopted, the total number of allocations issued to non-electric generating units would equal the portion (less the 5 percent set-aside discussed below) of the section 126 trading program budget for each State attributed to large non-electricity generating units (calculated as described in Section III.B.3.c.ii of this preamble by reducing each State's uncontrolled non-EGU $NO_X$ emissions level by 60 percent and assuming activity growth through 2007). At this time, the Agency proposes to use heat input as the basis for determining allocations for large non-electricity generating units in the Federal $NO_X$ Budget Trading Program. The EPA proposes this basis for both the initial allocation period of 2003 through 2005 and for subsequent years of the program. This differs from the method used to determine the aggregate emission level for non-electric generating units (a percentage reduction from historical emissions) because at the time the aggregate level was determined (during the SIP call proposal process), heat input data for individual units was not available. Distributing allocations on a heat-input basis provides a fuel-neutral method of allocating to the units in the trading program similar to the allocation approaches proposed for the electric generating units. Heat-input-based allocations also allow for reallocating in the future (to accommodate new units) whereas allocations based upon a specific percentage reduction do not. Heat input data is now available for use in developing allocations, and the Agency solicits comment on the data as well as the use of heat input in developing allocations.

At this time, the Agency is not aware of any databases on steam output information for industrial boilers. Therefore, for combustion sources other than electrical generators, EPA finds that it is most appropriate to base allocations upon heat input. However, EPA requests comment on any methods for distributing allowances on an output basis to non-electricity generating units. Comments should address the availability, quality, and appropriateness of the data for regulatory purposes and/or methods to obtain such data.

For the non-electricity generating units subject to the Federal trading program, EPA proposes to use 1995 heat input data in the allocation calculation for the control periods in 2003, 2004, and 2005. The 1995 data are the most recent data the Agency knows are currently available for non-electricity generating units. After this initial period of allocations, as with the electric generating units, the Agency will use data measured during the control period of the year that is four years before the year for which allocations are being calculated.

As was done for electricity generating units, the Agency has calculated unit specific allocations for large non-electricity generating units. These unit specific allocations are provided in Appendix A of proposed part 97. The EPA solicits comment on the underlying data used in these allocations and the methodology employed in determining the allocations. The Agency plans to describe a set of allocations in the final notice. The EPA would issue the final allocations for the control period in

2003 by placing them in the NATS by April 1, 2000 for those sources for which a finding has been triggered under section 126 at this time. For those sources for which a finding is not triggered by April 1, 2000, but for which a final finding is automatically trigger on May 1, 2000, EPA would issue the allocations for the 2000 control period to NATS as soon as practicable in the year 2000, consistent with the allocations finalized with this rulemaking.

For the non-electricity generating unit allocations proposed in today's notice, EPA determined initial unadjusted allocations to existing non-electric generating $NO_X$ Budget units by multiplying a $NO_X$ emission rate of 0.17 lb/mmBtu (the average emission rate for existing non-electricity generating budget units after controls are in place) by the units' historical heat input (described above as 1995 control season data).

After determining the initial unadjusted unit allocations, EPA adjusted the allocation for each unit upward or downward to match the portion of the section 126 trading program budget for the State attributed to large non-electricity generating units. Then, the Agency adjusted the allocation for each unit in the State proportionately so that the total allocations equaled 95 percent of the portion of the section 126 trading program budget for the State attributed to large non-electricity generating units.

The Agency proposes to set-aside 5 percent of the non-electricity generating unit allocations to be consistent with the allocation for electricity generating units. The EPA solicits comment on this approach and the proposed size of the set-aside.

(3) Treatment of New Sources. As discussed in previous sections, the Agency has proposed in part 97 a set-aside for new sources consistent with the provisions of part 96. New electricity generating units and non-electricity generating units required to participate in the Federal $NO_X$ Budget Trading Program will have access to this set-aside. In 2003, 2004, and 2005, each State set-aside would initially hold $NO_X$ allowances equal to 5 percent of the $NO_X$ allowances in the section 126 trading program budget in the State. Starting in 2006, each State set-aside would originally hold 2 percent of the $NO_X$ allowances in the section 126 trading program budget in the State. At the end of each relevant control period, EPA will return any allowances remaining in the account on a pro-rata basis to the units that had received an original allocation that had been adjusted to create the new source set-aside in the State.

The $NO_X$ allowances in the allocation set-aside would be available to any unit that would otherwise be eligible for an allocation in a control period but did not receive one because the unit commenced operation during or after the period on which the $NO_X$ allowance allocations for existing units were based. To receive $NO_X$ allowances from the allocation set-aside, the $NO_X$ Authorized Account Representative for a unit would submit a $NO_X$ allowance request to the Administrator. The request could be for no more than 5 consecutive control periods, starting with the control period during which the unit is projected to commence operation and ending with the control period preceding the control period for which it has sufficient data to receive an allocation with existing budget units. For the sixth year or later (and possibly earlier), there would be sufficient operating data for the unit to be incorporated into the $NO_X$ allowance allocations with existing $NO_X$ Budget units. The $NO_X$ allowance request would need to be submitted prior to May 1 of the first control period for which $NO_X$ allowances are requested and after the date on which the State issues a permit to construct the new unit.

Consistent with part 96, the allowances would be issued to new units on a first-come first-served basis. For the first allocation approach proposed for electric generating units, allowances to new electric generation units would be issued at a rate of 0.15 lb/mmBtu multiplied by the unit's maximum design heat input. Following each control period, the unit would be subject to a reduced utilization calculation. EPA would deduct $NO_X$ allowances following each control period based on the unit's actual utilization. Because the allocation for a new unit from the set-aside is based on maximum design heat input, this procedure adjusts the allocation by actual heat input for the control period of the allocation. This adjustment is a surrogate for the use of actual utilization in a prior baseline period which is the approach used for allocating $NO_X$ allowances to existing units.

For new non-electric generating units, allowances would be issued at the average emission rate (e.g., .17 lbs/mmBtu) for existing budget units (after controls are in place) multiplied by the budget unit's maximum design heat input. Following each control period, the source would be subject to a reduced utilization calculation similar to that described above for electric generating units.

For the second and third allocation approaches proposed for electric generating units, allowances to new electric generating units would be issued at the average emission rate (in lbs/kWh) for existing budget units (after controls are put in place) multiplied by the maximum design electrical generation derived from operation of the new budget unit. Following each control period, the budget unit would be subject to a reduced utilization calculation similar to that described above under the first approach.

d. Compliance Supplement Pool. This notice proposes to establish Federal emissions limits for sources found to significantly contribute to ozone nonattainment problems in a petitioning State. These sources would be required to comply with the emissions limits by May 1, 2003. As discussed in the final $NO_X$ SIP call and the technical support document ''Feasibility of Installing $NO_X$ Control Technologies By May 2003,'' EPA believes that this compliance date is a feasible and reasonable deadline. However, EPA received comments for the $NO_X$ SIP call expressing concern that some sources may encounter unexpected problems installing controls by this deadline that, in turn, could cause unacceptable risk for a source and its associated industry. Commenters explicitly expressed concern related to the electricity industry, stating that the deadline could adversely impact the reliability of the electricity supply.

In the $NO_X$ SIP call, EPA addressed these compliance concerns by providing additional flexibility for sources to comply with the requirements. The EPA is proposing that similar flexibility mechanisms be provided in part 97. First, EPA is proposing that part 97 include banking provisions as discussed in Section III.B.2.h. Second, EPA is proposing that part 97 include a compliance supplement pool that may be used by sources to cover excess emissions during the 2003 and 2004 ozone seasons that are unable to meet the compliance deadline. The proposed part 97 includes a separate compliance supplement pool that would be available to the sources in each State identified in this proposal.

i. Size of the Compliance Supplement Pool. The EPA proposes to use the same compliance supplement pools on a State-by-State basis as were included in the final $NO_X$ SIP call. The justification for the size of the State pools is included in the final $NO_X$ SIP call. Table III–2 shows the compliance supplement pool that would be

available to sources in each State identified in this proposal.

TABLE III–2. COMPLIANCE SUPPLEMENT POOLS (TONS OF $NO_X$)

| State | Compliance supplement pool |
|---|---|
| Alabama | 10,361 |
| Connecticut | 559 |
| Delaware | 417 |
| District of Columbia | 0 |
| Illinois | 17,455 |
| Indiana | 19,738 |
| Kentucky | 13,018 |
| Maryland | 3,662 |
| Massachusetts | 285 |
| Michigan | 15,359 |
| Missouri | 10,469 |
| New Jersey | 1,722 |
| New York | 1,831 |
| North Carolina | 10,624 |
| Ohio | 22,947 |
| Pennsylvania | 13,716 |
| Rhode Island | 0 |
| Tennessee | 12,093 |
| Virginia | 6,108 |
| West Virginia | 16,937 |

ii. Distribution of the Compliance Supplement Pool to Sources. In the final $NO_X$ SIP call, EPA provides States with two options for distributing the pool to sources. One option is for a State to distribute some or all of the pool to sources that generate early reductions during ozone seasons prior to May 1, 2003. The second option is for a State to run a public process to provide tons to sources that demonstrate a need for a compliance extension. Tons that are not distributed by a State prior to May 1, 2003 will be retired by EPA. A State wishing to use the compliance supplement pool under the $NO_X$ SIP call may divide the pool and make some of it available to sources through both options, or may use only one of the options for distributing the pool to sources prior to May 1, 2003. Based on these options, EPA is soliciting comment on a number of approaches for distributing the pool to sources under part 97.

First, EPA solicits comment as to whether the compliance supplement pool should be distributed by EPA to sources or distributed by EPA to the States that have sources included in this proposal. If the pools were distributed to States, the States would then be able to distribute the pool to sources. Part 97 is primarily designed to be implemented and administered directly by EPA. For this reason, it may be most efficient for EPA to retain the responsibility of distributing the pool to sources. However, it may be possible to provide more flexibility in the use of the pool for different sources if States were provided the distribution responsibility.

Second, provided that EPA decides to retain the responsibility of distributing the pool to sources, EPA solicits comment on two options for distribution. First, EPA solicits comment on distributing the compliance supplement pool only for early reductions. Under this option, the Agency would distribute allowances from the compliance supplement pool based upon the optional methodology the Agency laid out in the final $NO_X$ SIP call. Using that methodology, the Agency could issue early reduction credits for the 2001 and 2002 ozone season to units that have installed part 75 monitoring by the 2000 control season, have reduced their emission rate in 2001 or 2002 relative to their rate in 2000 by at least 20 percent, and are operating in the year(s) in which they are applying for early reduction credits at an emission rate below 0.25 lb/mmBtu. Provided it meets all of these criteria, a unit could request early reduction credits equal to the difference between 0.25 lb/mmBtu and the unit's actual emissions rate multiplied by the unit's actual heat input for the applicable control period. The Agency laid out the reasons for adopting each of these criteria for early reduction credits in the final $NO_X$ SIP call. Part 97 currently describes this option.

Under this option, if the tons of $NO_X$ in the State's compliance supplement pool exceeds the number of valid early reduction credit requests in that State, the Agency would issue one allowance for each ton of early reduction credit requested. Any allowances remaining in the compliance supplement pool after all valid requests have been granted would be retired by the Agency. If, however, the amount of valid requests are more than the size of the State's pool, the Agency would reduce the amount in the credit requests on a pro-rata basis so that the requests equal the size of the State's pool. After the requests have been reduced, the Agency would then issue allowances based on the remaining size of each credit request.

With this option, sources in States in the Ozone Transport Commission (OTC) that are subject to this section 126 action would be allowed to bring their banked allowances into the Federal $NO_X$ Budget Trading Program as early reduction credits provided the sum of the banked allowances in any State does not exceed the size of the State's compliance supplement pool. As is the case under this option for States outside of the OTC, any remaining credits in the compliance supplement pool would be retired. If the $NO_X$ Budget units in an OTC State hold banked allowances from the OTC program in excess of the amount of credits in the State's pool, the Agency would reduce the amount of allowances eligible for early reduction credit on a pro rata basis.

The Agency solicits comment on the methodology for issuing early reduction credits in this option as well as the approach that limits the use of the compliance supplement pool to early reduction credits. Specifically, the Agency solicits comment on alternative methods for calculating early reduction credits. In addition, EPA solicits comment on the approach specified for integration with the OTC Program.

The Agency also solicits comment on a second option for distribution of the compliance supplement pool. Under this second option, the Agency proposes that a portion of the compliance supplement pool be given out as early reduction credits and the remaining portion be reserved for sources that demonstrate a need for the compliance supplement. As described in the preamble to the final $NO_X$ SIP call, sources would be responsible for demonstrating to the Agency and the public achieving compliance by May 1, 2003 would create undue risk either to its own operation or associated industry. The administrator of the compliance supplement pool would provide the public an opportunity to comment on the validity of the need for this ''direct distribution'' of the compliance supplement.

Under this option, the Agency would grant early reduction credits using the method described in the first option (or some variation of that approach) before allowing sources access to the direct distribution credits from the compliance supplement pool. The Agency proposes to address OTC banked allowances held by sources subject to a section 126 action as suggested in the first option. To ensure that the compliance supplement is only provided to sources that truly need a compliance extension, the remaining credits in the compliance supplement pool would be given out to an owner or operator of a source that demonstrates the following:

- The process of achieving compliance by May 1, 2003 would create undue risk for the source or its associated industry. For electric generating units, the demonstration should show that installing controls would create unacceptable risks for the reliability of the electricity supply during the time of installation. This demonstration would include a showing that it was not feasible to import electricity from other systems during the

time of installation. Non-electricity generating sources may also be eligible for the compliance supplement based on a demonstration of risk comparable to that described for the electricity industry.

- It was not possible to compensate for delayed compliance by generating early reduction credits at the source or by acquiring credits generated by other sources.
- It was not possible to acquire allowances or credits for the 2003 ozone season from sources that will make reductions beyond required levels during the 2003 ozone season.

The Agency solicits comment on this option that distributes the compliance supplement pool both through early reduction credits as well as direct distribution. Specifically, the Agency requests comment on the number of credits to reserve for direct distribution, the methodology used for direct distribution, and options for public review of the direct distribution. The Agency also solicits comment on the appropriate administrator of the direct distribution.

Under any of the options described above, the Agency proposes that $NO_X$ allowances issued from the compliance supplement pool would only be available for sources to use for compliance in the 2003 or 2004 control periods. Any $NO_X$ allowance issued from the compliance supplement pool that is not used for compliance in 2003, would be considered to be ''banked'' for the 2004 control period. The Agency proposes to retire any $NO_X$ allowance issued from the compliance supplement pool that is not used in either the 2003 or 2004 control period at the end of the 2004 true-up period for the reasons cited in the preamble to the final $NO_X$ SIP call.

e. Emissions Monitoring and Reporting. Subpart H of today's proposed rule addresses monitoring and reporting requirements including, among other things, general requirements, initial certification and recertification procedures, out of control periods, notifications, recordkeeping and reporting, and petitions. These provisions are essentially the same as the monitoring-related provisions of part 96, with cross references to the appropriate sections of part 97. The differences between the provisions reflect the fact that administration of the monitoring requirements is overseen by EPA, rather than by EPA and the permitting authority as is the case in the State $NO_X$ Budget Trading Program. As a result, for example, monitoring certification applications are submitted to the Administrator and the appropriate EPA Regional Office in addition to the permitting authority, and the Administrator, not the permitting authority, will act on the applications. Further, the Administrator handles all audit decertifications and all petitions for alternatives to the monitoring requirements. Another difference is that in the State $NO_X$ Budget Trading Program, EPA included heat input monitoring requirements that States might choose to adopt if they were basing their allocation methodologies on heat input. The proposed Federal $NO_X$ Budget Trading Program bases its allocation approach on heat input. Therefore, EPA has included the heat input monitoring and reporting requirements in proposed part 97. Note that as explained in Section III.3.c.5 of the preamble, EPA is taking comment on three different allocation methodologies. Depending on the methodology chosen, monitoring and reporting requirements would vary.

The EPA is proposing these part 97 provisions for the reasons set forth both in the proposed $NO_X$ SIP call (63 FR 25938–40) and the final $NO_X$ SIP call, and in order to minimize differences between the Federal and State $NO_X$ Budget Trading Programs.

In particular, for the reasons set forth in the $NO_X$ SIP call, EPA proposes that $NO_X$ Budget units be required to meet the monitoring and reporting requirements in a new subpart H of 40 CFR part 75, the Acid Rain Program regulations (63 FR 25938–40). The EPA has promulgated these revisions part 75 to establish $NO_X$ mass monitoring requirements and provide greater flexibility to regulated sources in conjunction with the final $NO_X$ SIP call rule.

f. Opt-ins. Subpart I of today's proposed rule addresses the opt-in process and procedures applicable to operating units that are not $NO_X$ Budget units under § 97.4, but are located in a State that is included in the Federal $NO_X$ Budget Trading Program and wish to voluntarily enter (i.e., opt into) the trading program. The opt-in provisions can further reduce the cost of achieving $NO_X$ reductions by allowing these units to join the $NO_X$ Budget Trading Program and make incremental, lower cost reductions, freeing $NO_X$ allowances for use by other $NO_X$ Budget units. There are potentially individual sources not included in the trading program that may emit significant amounts of $NO_X$ and are able to achieve cost-effective reductions; allowing these sources to join the program would reduce the overall cost of compliance for the program. The EPA proposes in subpart I to allow individual combustion sources that are located in a State for which a section 126 remedy in promulgated, vent to a stack, and can monitor $NO_X$ mass emissions, the opportunity to opt-in to the Federal program for purposes of the section 126 remedy. The EPA solicits comment on the appropriateness of these opt-in provisions.

Subpart I addresses, among other things, the applicability requirements, allocations, procedures for applying for a $NO_X$ Budget opt-in permit, the process of reviewing and approving or denying the permit, contents of the permit, procedures for withdrawing as a $NO_X$ Budget opt-in source, and changes in regulatory status. The provisions of this subpart are similar to the opt-in provisions in part 96, with cross references to the appropriate sections in part 97, though the Administrator plays a greater role than in part 96 with regard to actions on opt-in permits, allocations, and other related opt-in submissions. For example, under the Federal trading program, $NO_X$ budget opt-in permit applications are submitted to both the Administrator and the permitting authority, but only the Administrator may determine whether the unit qualifies as a $NO_X$ Budget opt-in source. Furthermore the Administrator, rather than the permitting authority, allocates allowances to sources in the Federal $NO_X$ Budget Trading Program. The EPA is proposing these part 97 provisions for the reasons set forth both in the proposed $NO_X$ SIP call (63 FR 25940–42) and the final $NO_X$ SIP call, and in order to minimize differences between the Federal and State $NO_X$ Budget Trading Programs.

g. Program administration. As discussed above, the Federal $NO_X$ Budget Trading Program would be run by EPA. The EPA would identify the units covered by the program, determine and record the $NO_X$ allowance allocations, receive and review monitoring plans and monitoring certification applications, and take the lead in enforcement. As discussed above, States would still be responsible for permitting.

### *C. New Source Review*

As discussed in the proposed and final $NO_X$ SIP call, the EPA believes that nonattainment New Source Review (NSR) offset requirements of the CAA can be met using the mechanism of the State $NO_X$ Budget Trading Program under part 96. However, because the Agency is continuing to evaluate a number of complex issues involved with integrating NSR and the trading program, it will not be providing guidance at this time. The EPA intends

to provide such guidance as soon as possible. At that time, the EPA will also address integrating NSR with the trading program under part 97.

## IV. Non-Ozone Benefits to $NO_X$ Reductions

In addition to contributing to attainment of the ozone NAAQS, decreases of $NO_X$ emissions will also likely help improve the environment in several important ways. On a national scale, decreases in $NO_X$ emissions will also decrease acid deposition, nitrates in drinking water, excessive nitrogen loadings to aquatic and terrestrial ecosystems, and ambient concentrations of nitrogen dioxide, particulate matter, and toxics. On a global scale, decreases in $NO_X$ emissions will, to some degree, reduce greenhouse gases and stratospheric ozone depletion. Thus, management of $NO_X$ emissions is important to both air quality and watershed protection on national and global scales. In its July 8, 1997 final recommendations, OTAG stated that it ''recognizes that $NO_X$ controls for ozone reductions purposes have collateral public health and environmental benefits, including reductions in acid deposition, eutrophication, nitrification, fine particle pollution, and regional haze.'' These and other public health and environmental benefits associated with decreases in $NO_X$ emissions are summarized below.[16]

*Acid Deposition:* Sulfur dioxide and $NO_X$ are the two key air pollutants that cause acid deposition (wet and dry particles and gases) and result in the adverse effects on aquatic and terrestrial ecosystems, materials, visibility, and public health. Nitric acid deposition plays a dominant role in the acid pulses associated with the fish kills observed during the springtime melt of the snowpack in sensitive watersheds and recently has also been identified as a major contributor to chronic acidification of certain sensitive surface waters.

*Drinking Water Nitrate:* High levels of nitrate in drinking water is a health hazard, especially for infants. Atmospheric nitrogen deposition in sensitive watersheds can increase stream water nitrate concentrations; the added nitrate can remain in the water and be transported long distances downstream.

*Eutrophication:* $NO_X$ emissions contribute directly to the widespread accelerated eutrophication of United States coastal waters and estuaries. Atmospheric nitrogen deposition onto surface waters and deposition to watershed and subsequent transport into the tidal waters has been documented to contribute from 12 to 44 percent of the total nitrogen loadings to United States coastal water bodies. Nitrogen is the nutrient limiting growth of algae in most coastal waters and estuaries. Thus, addition of nitrogen results in accelerated algae and aquatic plant growth causing adverse ecological effects and economic impacts that range from nuisance algal blooms to oxygen depletion and fish kills.

*Global Warming:* Nitrous oxide ($N_2O$) is a greenhouse gas. Anthropogenic $N_2O$ emissions in the United States contribute about 2 percent of the greenhouse effect, relative to total United States anthropogenic emissions of greenhouse gases. In addition, emissions of $NO_X$ lead to the formation of tropospheric ozone, which is another greenhouse gas.

*Nitrogen Dioxide* ($NO_2$): Exposure to $NO_2$ is associated with a variety of acute and chronic health effects. The health effects of most concern at ambient or near-ambient concentrations of $NO_2$ include mild changes in airway responsiveness and pulmonary function in individuals with pre-existing respiratory illnesses and increases in respiratory illnesses in children. Currently, all areas of the United States monitoring $NO_2$ are below EPA's threshold for health effects.

*Nitrogen Saturation of Terrestrial Ecosystems:* Nitrogen accumulates in watersheds with high atmospheric nitrogen deposition. Because most North American terrestrial ecosystems are nitrogen limited, nitrogen deposition often has a fertilizing effect, accelerating plant growth. Although this effect is often considered beneficial, nitrogen deposition is causing important adverse changes in some terrestrial ecosystems, including shifts in plant species composition and decreases in species diversity or undesirable nitrate leaching to surface and ground water and decreased plant growth.

*Particulate Matter (PM):* $NO_X$ compounds react with other compounds in the atmosphere to form nitrate particles and acid aerosols. Because of their small size nitrate particles have a relatively long atmospheric lifetime; these small particles can also penetrate deeply into the lungs. The PM has a wide range of adverse health effects.

*Stratospheric Ozone Depletion:* A layer of ozone located in the upper atmosphere (stratosphere) protects people, plants, and animals on the surface of the earth (troposphere) from excessive ultraviolet radiation. The $N_2O$, which is very stable in the troposphere, slowly migrates to the stratosphere. In the stratosphere, solar radiation breaks it into nitric oxide (NO) and nitrogen (N). The NO reacts with ozone to form $NO_2$ and molecular oxygen. Thus, decreasing $N_2O$ emissions would result in some decrease in the depletion of stratospheric ozone.

*Toxic Products:* Airborne particles derived from $NO_X$ emissions react in the atmosphere to form various nitrogen containing compounds, some of which may be mutagenic. Examples of transformation products thought to contribute to increased mutagenicity include the nitrate radical, peroxyacetyl nitrates, nitroarenes, and nitrosamines.

*Visibility and Regional Haze:* The $NO_X$ emissions lead to the formation of compounds that can interfere with the transmission of light, limiting visual range and color discrimination. Most visibility and regional haze problems can be traced to airborne particles in the atmosphere that include carbon compounds, nitrate and sulfate aerosols, and soil dust. The major cause of visibility impairment in the eastern United States is sulfates, while in the West the other particle types play a greater role.

*Justification for Rulemaking:* While EPA believes the information is important for the public to understand and, thus, needs to be described as part of the rulemaking and RIA, there should be no misunderstanding as to the legal basis for the rulemaking, which is described in Section I, Background, of this notice and does not depend on the non-ozone benefits. The non-ozone benefits did not affect the method in which EPA determined significant contribution nor the proposed control requirements.

## V. Administrative Requirements

### *A. Executive Order 12866: Regulatory Impact Analysis*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether a regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

[16] U.S. Environmental Protection Agency, ''Nitrogen Oxides: Impacts on Public Health and the Environment,'' EPA–452/R–97–002, August 1997.

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The EPA believes that this action is a ''significant regulatory action'' because it raises novel legal and policy issues arising from the Agency's obligation to respond to the section 126 petitions, and because the action could have an annual effect on the economy of more than $100 million. As a result, the proposed rulemaking was submitted to OMB for review, and EPA has prepared a RIA titled ''Regulatory Impact Analysis of Proposed CAA Section 126 Petitions for $NO_X$, September 1998.'' This RIA assesses the costs, benefits, and economic impacts associated with Federally-imposed requirements to mitigate $NO_X$ emissions from sources contributing to downwind nonattainment of the ozone NAAQS. Any written comments from OMB to EPA and any written EPA response to those comments are included in the docket. The docket is available for public inspection at the EPA's Air Docket Section, which is listed in the **ADDRESSES** section of this preamble. The RIA is available in hard copy by contacting the EPA Library at the address under ''Availability of Related Information'' and in electronic form as discussed above in that same section.

The RIA for the section 126 petitions addresses the costs and benefits associated with reducing emissions at sources affected under the petitions in the broader context of those sources potentially affected by the final $NO_X$ SIP call and its associated FIP. There is a high likelihood that sources named in the section 126 petitions will also be controlled under SIPs that will be revised to meet final $NO_X$ budgets. In the event that States fail to submit approvable SIPs, FIPs will be enacted. Therefore, from the perspective of a regulatory analysis that is focused on the year 2007, the sources named in section 126 petitions will be complying with either State or Federal regulations of generally equivalent stringency.

The RIA for the $NO_X$ SIP call concludes that the national annual cost of possible State actions to comply with the $NO_X$ SIP call are approximately $1.7 billion (1990 dollars). The sources named in the section 126 petitions will bear some portion of that total cost. The associated benefits, in terms of improvements in health, visibility, and ecosystem protection, that EPA has quantified and monetized range from $1.1 billion to $4.2 billion, with EPA's best estimate being $3.4 billion. Due to practical analytical limitations, the EPA is not able to quantify and/or monetize all potential benefits of the $NO_X$ SIP call action.

*B. Impact on Small Entities*

1. Regulatory Flexibility

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), provides that whenever an agency is required to publish a general notice of proposed rulemaking, it must prepare and make available an initial regulatory flexibility analysis, unless it certifies that the proposed rule, if promulgated, will not have ''a significant economic impact on a substantial number of small entities.''

In the process of developing this rulemaking, EPA worked with SBA and OMB and obtained input from small businesses, small governmental jurisdictions, and small organizations. On June 23, 1998, EPA's Small Business Advocacy Chairperson convened a Small Business Advocacy Review Panel under section 609(b) of the RFA as amended by SBREFA. In addition to its chairperson, the Panel consists of EPA's Director of the Office of Air Quality Planning and Standards within the Office of Air and Radiation, the Administrator of the Office of Information and Regulatory Affairs within the OMB, and the Chief Counsel for Advocacy of the SBA.

As described below, this Panel conducted an outreach effort and completed a report on the section 126 proposal. The report provides background information on the proposed rule being developed and the types of small entities that would be subject to the proposed rule, describes efforts to obtain the advice and recommendations of representatives of those small entities, summarizes the comments that have been received to date from those representatives, and presents the findings and recommendations of the Panel; the completed report, comments of the small entity representatives, and other information are contained in the docket for this rulemaking.

It is important to note that the Panel's findings and discussion are based on the information available at the time this report was drafted. The EPA is continuing to conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during the remainder of the rule development process. The Panel makes its report at a preliminary stage of rule development and its report should be considered in that light. At the same time, the report provides the Panel and the Agency with an opportunity to identify and explore potential ways of shaping the proposed rule to minimize the burden of the rule on small entities while achieving the rule's statutory purposes. Any options the Panel identifies for reducing the rule's regulatory impact on small entities may require further analysis and/or data collection to ensure that the options are practicable, enforceable, environmentally sound and consistent with the statute authorizing the proposed rule.

2. Outreach to Small Entity Representatives

In consultation with the SBA, EPA invited small entity representatives to participate in its outreach efforts on this proposal. The EPA, OMB, and SBA held an initial outreach meeting with a group of small-entity representatives in Washington, DC, on April 14, 1998. The purpose of this meeting was to familiarize the small-entity representatives with the substance of the rulemaking and the kinds of sources being considered for regulation, and to solicit comment on these topics. Subsequent to the meeting, the representatives submitted follow-up comments in writing. The primary outreach was accomplished by a meeting with the small-entity representatives in Washington, D.C. on August 4, 1998. The purpose of this meeting was to present the results of EPA's analysis on small-entity impacts, and to solicit comment on this analysis and on suggestions for impact mitigation. Subsequent to the meeting, the representatives submitted follow-up comments in writing.

To define small entities, EPA used the SBA industry-specific criteria published in 13 CFR part 121. The SBA size standards have been established for each type of economic activity under the Standard Industrial Classification (SIC) System. Due to their $NO_X$-emitting properties, the following industries have the potential to be affected by the section 126 rulemaking:

SIC Codes in Division D: Manufacturing

2611—Pulp mills
2819—Industrial Inorganic Materials
2821—Plastics Materials, Synthetic Resins, and Nonvulcanizable Elastomers
2869—Industrial Organic Chemicals
3312—Steel Works, Blast Furnaces, and Rolling Mills
3511—Steam, Gas, and Hydraulic Turbines

3519—Stationary Internal Combustion Engines
3585—Air-Conditioning and Warm-Air Heating Equipment and Commercial and Industrial Refrigeration Equipment

SIC Codes in Division E: Transportation, Communications, Electric, Gas, and Sanitary Services

SIC Major Group 49: Electric, Gas, and Sanitary Services, including:

4911—Electric Utilities
4922—Natural Gas Transmission
4931—Electric and other Gas Services
4961—Steam and Air Conditioning Supply

3. Potentially Affected Small Entities

The primary topic of Panel discussion was the applicability of the section 126 rule to the various categories of $NO_X$-emitting sources, the costs the rule would impose, and the possibility of further reducing rule applicability. Secondary topics included emissions monitoring and other potentially duplicative Federal rules. These discussions are summarized below.

The section 126 rulemaking is potentially applicable to all $NO_X$-emitting entities named in one or more of the section 126 petitions. Since this is a subset of the entities covered by the FIP proposal, any impacts from the section 126 rule will be a subset of the FIP impacts, and the FIP proposal represents the worst case that could result if all eight section 126 petitions were granted. Therefore, EPA has applied its limited time and resources to developing estimates of impact based on the FIP proposal, with the knowledge that it represents the worst case in terms of impact on small entities.

The EPA estimates that the total number of such entities named in the section 126 petitions is approximately 5200, of which about 1200 are small entities. The EPA is considering reducing this applicability based on several factors including input from this Panel, considerations of overall cost effectiveness, and administrative efficiency. Specifically, EPA is proposing to exempt a number of sources from being subject to this regulation based on factors such as low relative emissions and lack of specific source information. These factors are discussed in detail elsewhere in this notice. Additional sources are being considered for exemption because they may not be highly cost effective to control, with EPA considering an average cost effectiveness of $2000 per ton of $NO_X$ removed as the upper limit for highly cost-effective reductions.

If EPA takes final action as proposed today with this reduced-applicability approach, the section 126 rulemaking will apply only to the following types of sources: Large electric generating units (EGUs), industrial boilers, and combustion turbines. The stringency levels of control EPA currently intends to propose for these types of sources is as follows: For EGUs, an emission rate of 0.15 pounds of $NO_X$ per million BTU and for industrial boilers and combustion turbines, an emission reduction of 60 percent. At these stringency levels, the estimated number of small entities that would be affected is as follows:

Electric Generating Units—114 small entities
Industrial Boilers and/or Combustion Turbines—31 small entities

The EPA has further estimated that, of these affected small entities, the following would experience compliance costs equal or greater to 1 percent of their estimated revenues:

Electric Generating Units—32 small entities
Industrial Boilers and Combustion Turbines—7 small entities

Of these, EPA estimates that about 18 small entities with electric generating units and 4 small entities with industrial boilers or turbines would experience costs greater than 3 percent of their estimated revenues.

Focusing the rule on this limited group of sources would constitute a reduction of over 85 percent in the number of small entities potentially affected by the rule: out of 1200 potentially-affected small entities, over 1000 would be exempted, with only 145 small entities remaining. The Panel received written comments from three small-entity representatives strongly endorsing these exemptions.

4. Panel Findings and EPA Actions

a. Exemptions. The Panel agreed with the general approach EPA is proposing to define the scope of the rule. The Panel recommended that the exemptions noted above be included in the proposal, and further recommended that the applicability of EPA's proposed rule be limited to the sources shown in that section. As discussed earlier in this notice, EPA is proposing to limit applicability as recommended by the Panel. Furthermore, as described below, the Panel considered it appropriate to explore additional options for reducing the impact of the rule.

Several of the small entity representatives suggested that EPA exempt all small entities from this rulemaking. Although EPA does not feel that a blanket, across-the-board exemption could be supported, EPA is receptive to proposals for further exemptions, up to and including exempting all small entities if that could be shown to be appropriate. As recommended by the Panel, EPA solicits comment on additional types of small-entity exemptions and the rational bases on which such exemptions could be made, such as disproportionate ability to bear costs and administrative burden.

b. Continuous Emissions Monitoring Systems (CEMS). The Panel received both written and oral comments to the effect that CEMS would be prohibitively costly for many industrial boilers, representing a significant part of the cost of the rule. The OMB and SBA share the commenters' concern for the potentially high cost of CEMS requirements. The EPA believes that it is necessary for all sources in the trading program to be subject to accurate and consistent monitoring requirements designed to demonstrate compliance with a mass emission limitation, and therefore intends to require all large units to monitor $NO_X$ mass emissions using CEMS (including units opting-in to the trading program). In the proposed section 126 rule, all affected sources are included in the trading program. However, EPA does believe that it is appropriate to provide lower cost monitoring options for units with low $NO_X$ mass emissions, and therefore intends to allow non-CEMS alternatives for units that have emissions of less than 50 tons per year of $NO_X$. This cutoff will provide relief for boilers large enough to be covered by the rule, but that run for a smaller number of hours each year, including any such boilers owned by small entities.

c. Electric Generating Units. The next area considered by the Panel was electric generating units (EGUs). The EPA's analysis shows that slightly more than 30 EGUs may experience costs above 1 percent of revenues, and that 18 of these might exceed 3 percent. From comments made by small utilities, the Panel suspects that many of these high-cost-to-revenue situations may involve peaking units, which run only a small percentage of the time and thus may be inefficient to control. To address this problem, the Panel recommended that EPA solicit comment on whether to allow electric generating units to obtain a Federally-enforceable $NO_X$ emission tonnage limit (e.g., 25 tons during the ozone season) and thereby obtain an exemption. The EPA solicits comment on the necessity for and appropriateness of such an option.

d. Industrial Boilers. Individual Panel members conceived of other potential ways to mitigate impact on small entities, such as raising the size cutoff for small entities and/or lessening the required percentage reduction in $NO_X$ emissions required from small entities. The SBA encouraged the Agency to

conduct analyses to determine the impact of 40 percent reduction being applied solely to small entities and 60 percent solely to large entities, and the resulting effect on control levels for sources regulated in the proposal. The EPA solicits comment on whether requirements should be reduced on small-entity-owned industrial boilers by some combination of raising the size cutoff and/or lessening the required reduction; which, if any, of these options is preferable; the necessity and appropriateness of any such option; the appropriate level (e.g., 40 percent reduction instead of 60 percent); and information to support any comments submitted.

e. EPA Guidance to States on Small Entities. Finally, the Panel noted that several small entity representatives expressed concern that regardless of the sensitivity to small-entity concerns EPA shows in the (FIP or) section 126 rulemaking, the States may nevertheless see fit to target small entities in their SIPs. To help address this problem, the Panel recommended that, subsequent to the FIP and section 126 proposals, EPA issue guidance that conveys to the States the kinds of options and alternatives EPA has considered in addressing small-entity concerns, explain the rationale behind these kinds of options, and recommended that the States consider adopting similar alternatives in their SIPs. The EPA intends to address this issue as it develops implementation guidance for the States to use in developing SIPs.

*C. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub.L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, 2 U.S.C. 1532, EPA generally must prepare a written statement, including a cost-benefit analysis, for any proposed or final rule that ''includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more ... in any one year.'' A ''Federal mandate'' is defined under section 421(6), 2 U.S.C. 658(6), to include a ''Federal intergovernmental mandate'' and a ''Federal private sector mandate.'' A ''Federal intergovernmental mandate,'' in turn, is defined to include a regulation that ''would impose an enforceable duty upon State, local, or tribal governments,'' section 421(5)(A)(i), 2 U.S.C. 658(5)(A)(i), except for, among other things, a duty that is ''a condition of Federal assistance,'' section 421(5)(A)(i)(I). A ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector,'' with certain exceptions, section 421(7)(A), 2 U.S.C. 658(7)(A).

The EPA is taking the position that the requirements of UMRA apply because this action could result in the establishment of enforceable mandates directly applicable to sources (including sources owned by State and local governments) that would result in costs greater than $100 million in any one year. The UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least-costly, most cost-effective or least-burdensome alternative that achieves the objectives of the rule. The EPA's UMRA analysis, ''Unfunded Mandates Reform Act Analysis For the Proposed Section 126 Petitions Under the Clean Air Act Amendments Title I,'' is contained in the docket for this action and is summarized below.

This UMRA analysis examines the impacts of the proposed section 126 rulemaking on both EGUs and non-EGUs that are owned by State, local, and tribal governments, as well as sources owned by private entities. This proposal potentially affects 65 EGUs that are owned by one State and 24 municipalities (Massachusetts owns 6 units, and the municipalities own the remaining 59 units). In addition, 7 non-EGUs owned by 2 States and 5 municipalities are potentially affected. The EPA has not identified any units on Tribal lands that would be subject to the proposed requirements. The overall costs are dominated by the 65 EGUs and are about $30 million per year. Their cost impacts are only slightly higher than their production share, in comparison to all units in the region.

Under section 203 of UMRA, 2 U.S.C. 1533, before EPA establishes any regulatory requirements ''that might significantly or uniquely affect small governments,'' EPA must have developed a small government agency plan. The plan must provide for notifying potentially affected small governments; enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates; and informing, educating, and advising small governments on compliance with the regulatory requirements. The proposed requirements do not distinguish EGUs based on ownership, either for those units that are included within the scope of the proposed rule or for those units that are exempted by the generating capacity cut-off. Consequently, the proposed rule has no requirements that uniquely affect small governments that own or operate EGUs within the affected region. With respect to the significance of the rule's provisions, EPA's UMRA analysis (cited above) demonstrates that the economic impact of the rule will not significantly affect State or municipal EGUs or non-EGUs, either in terms of total cost incurred and the impact of the costs on revenue, or increased cost of electricity to consumers. Therefore, development of a small government plan under section 203 of the Act is not required.

Under section 204 of UMRA, 2 U.S.C. 1534, if an agency proposes a rule that contains a ''significant Federal intergovernmental mandate'', the agency must develop a process to permit elected officials of State, local, and tribal governments to provide input into the development of the proposal.'' In order to fulfill UMRA requirements that publicly-elected officials be given meaningful and timely input in the process of regulatory development, EPA has sent letters to five national associations whose members include elected officials. The letters provide background information, request the associations to notify their membership of the proposed rulemaking, and encourage interested parties to comment on the proposed actions by sending comments during the public comment period and presenting testimony at the public hearing on the proposal. Any comments will be taken into consideration as the action moves toward final rulemaking.

In addition, during the $NO_X$ SIP call, EPA provided direct notification to potentially affected State and municipally-owned utilities as part of the public comment and hearing process attendant to proposal of the $NO_X$ SIP call and supplemental notice of proposed rulemaking. These procedures helped ensure that small governments had an opportunity to give timely input and obtain information on compliance. The EPA provided the 26 State and municipality-owned utilities and appropriate elected officials with a brief summary of the proposal and the estimated impacts. The public rulemaking also elicited numerous comments from State and municipal utilities and groups representing utility interests.

Furthermore, for the section 126 rulemaking, EPA published an ANPR that served to provide notice of the Agency's intention to propose emissions limits and to solicit early input on the proposal. This process helped to ensure

that small governments had an opportunity to give timely input and obtain information on compliance.

*D. Paperwork Reduction Act*

The information collection requirements in this proposed rule have been submitted for approval to the OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1889.01) and a copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division, US Environmental Protection Agency (2137), 401 M St., SW, Washington, DC 20460 or by calling (202) 260–2740.

The EPA believes that it is essential that sources for whom findings are made under section 126 of the CAA demonstrate that they are achieving their required reductions. This is achieved through the monitoring and reporting of emissions. Accurate and consistent monitoring of emissions also facilitates the trading program which helps ensure that emission reductions are achieved in the most cost affective way possible.

*Respondents/Affected Entities:* Large fossil fuel boilers, turbines and combined cycle units which are included in the section 126 proposal.

*Number of Respondents:* 2011.

*Frequency of Response:*

—Emissions reports quarterly for some units, twice during ozone season for others

—Test notifications and allowance transfers on an infrequent basis

—Compliance certifications on an annual basis

*Estimated Annual Hour Burden per Respondent:* 107.

*Estitmated Annual Cost per Respondent:* $7,943.

*Estimated Total Annual Hour Burden:* 216,671.

*Estimated Total Annualized Cost:* $13,859,599.

Note that these are an average estimate for the first three years of the program. The EPA estimates lower costs in the first two years of the program because less units will be participating at that time. The units that will be participating at that time are units that are applying for early reduction credits. The EPA also estimates that the highest compliance costs will occur in 2002, when the majority of the units that have to install and certify new monitors to comply with the program will do so. The EPA believes that the year 2003 will be more representative of the actual ongoing costs of the program. At that time EPA estimates a burden of 179 hours per source and a cost of $27,670 per source.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR ch. 15.

Comments are requested on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, Office of Policy, Regulatory Information Division, US Environmental Protection Agency (2137), 401 M St., SW, Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW, Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Comments are requested by December 7, 1998. Please include the ICR number in any correspondence.

*E. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

1. Applicability of Executive Order 13045

The Executive Order 13045 applies to any rule that EPA determines (1) ''economically significant'' as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children; and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This proposed rule is not subject to Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it does not involve decisions on environmental health risks or safety risks that may disproportionately affect children.

2. Children's Health Protection

In accordance with section 5(501), the Agency has evaluated the environmental health or safety effects of the rule on children, and found that the rule does not separately address any age groups. However, in conjunction with the final $NO_X$ SIP call rulemaking, the Agency has conducted a general analysis of the potential changes in ozone and PM levels experienced by children as a result of the $NO_X$ SIP call; these findings are presented in the RIA. The findings include population-weighted exposure characterizations for projected 2007 ozone and PM concentrations. The population data includes a census-derived subdivision for the under 18 group.

*F. Executive Order 12898: Environmental Justice*

Executive Order 12848 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. In conjunction with the final $NO_X$ SIP call rulemaking, the Agency has conducted a general analysis of the potential changes in ozone and PM levels that may be experienced by minority and low-income populations as a result of the $NO_X$ SIP call; these findings are presented in the RIA. The findings include population-weighted exposure characterizations for projected ozone concentrations and PM concentrations. The population data includes census-derived subdivisions for whites and non-whites, and for low-income groups.

*G. Executive Order 12875: Enhancing the Intergovernmental Partnership*

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments or EPA consults with those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with

representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

The EPA has concluded that this rule may create a mandate on State and local governments and that the Federal government will not provide the funds necessary to pay the direct costs incurred by the State and local governments in complying with the mandate. In order to provide meaningful and timely input in the development of this regulatory action, EPA has sent letters to five national associations whose members include elected officials. The letters provide background information, request the associations to notify their membership of the proposed rulemaking, and encourage interested parties to comment on the proposed actions by sending comments during the public comment period and presenting testimony at the public hearing on the proposal. Any comments will be taken into consideration as the action moves toward final rulemaking.

Furthermore, for the section 126 rulemaking, EPA published an ANPR that served to provide notice of the Agency's intention to propose emissions limits and to solicit early input on the proposal. This process helped to ensure that small governments had an opportunity to give timely input and obtain information on compliance.

*H. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments*

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments and, in any event, will not impose substantial direct compliance costs on such communities. The EPA is not aware of sources located on tribal lands that could be subject to the requirements EPA is proposing in this notice. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub L. 104–113, § 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking would require all sources that participate in the trading program under proposed part 97 to meet the applicable monitoring requirements of part 75. Part 75 already incorporates a number of voluntary consensus standards. In addition, EPA's proposed revisions to part 75 proposed to add two more voluntary consensus standards to the rule (see 63 FR at 28116–17, discussing ASTM D5373–93 ''Standard Methods for Instrumental Determination of Carbon, Hydrogen and Nitrogen in laboratory samples of Coal and Coke,'' and API Section 2 ''Conventional Pipe Provers'' from Chapter 4 of the Manual of Petroleum Measurement Standards, October 1988 edition). The EPA's proposed part 75 revisions also requested comments on the inclusion of additional voluntary consensus standards. The EPA has recently finalized revisions to part 75 addressing some of the topics raised in EPA's proposed revisions to part 75. As part of this rule finalization, EPA incorporated two new voluntary consensus standards:

(1) American Petroleum Institute (API) Petroleum Measurement Standards, Chapter 3, Tank Gauging: Section 1A, Standard Practice for the Manual Gauging of Petroleum and Petroleum Products, December 1994; Section 1B, Standard Practice for Level Measurement of Liquid Hydrocarbons in Stationary Tanks by Automatic Tank Gauging, April 1992 (reaffirmed January 1997); Section 2, Standard Practice for Gauging Petroleum and Petroleum Products in Tank Cars, September 1995; Section 3, Standard Practice for Level Measurement of Liquid Hydrocarbons in Stationary Pressurized Storage Tanks by Automatic Tank Gauging, June 1996; Section 4, Standard Practice for Level Measurement of Liquid Hydrocarbons on Marine Vessels by Automatic Tank Gauging, April 1995; and Section 5, Standard Practice for Level Measurement of Light Hydrocarbon Liquids Onboard Marine Vessels by Automatic Tank Gauging, March 1997; and

(2) Shop Testing of Automatic Liquid Level Gages, Bulletin 2509 B, December 1961 (Reaffirmed October 1992), for § 75.19.

The EPA intends to finalize other revisions to part 75 and address comments related to additional voluntary consensus standards at that time.

This proposed rulemaking involves environmental monitoring or measurement. Sources that participate in the trading program would be required to meet the monitoring requirements under part 75. Consistent with the Agency's Performance Based Measurement System (PBMS), part 75 sets forth performance criteria that allow the use of alternative methods to the ones set forth in part 75. The PBMS approach is intended to be more flexible and cost effective for the regulated community; it is also intended to encourage innovation in analytical technology and improved data quality. The EPA is not precluding the use of any method, whether it constitutes a voluntary consensus standard or not, as long as it meets the performance criteria specified, however, any alternative methods must be approved in advance before they may be used under part 75.

The EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

**List of Subjects**

*40 CFR Part 52*

Environmental protection, Air pollution control, Emissions trading, Nitrogen oxides, Ozone transport, Reporting and recordkeeping requirements.

*40 CFR Part 97*

Environmental protection, Air pollution control, Emissions trading, Nitrogen oxides, Ozone transport, Reporting and recordkeeping requirements.

Dated: September 24, 1998.

**Carol M. Browner,**

*Administrator.*

For the reasons set forth in the preamble, parts 52 and 97 of chapter I of title 40 of the Code of Federal Regulations are proposed to be amended as follows:

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401–7671q.

### Subpart A—General Provisions

2. Subpart A is amended to add § 52.34 to read as follows:

**§ 52.34 Action on petitions submitted under section 126 relating to emissions of nitrogen oxides.**

(a) *Purpose and applicability.* Paragraphs (b) through (i) of this section set forth EPA's affirmative and negative technical determinations regarding whether, with respect to the national ambient air quality standards (NAAQS) for ozone, certain new and existing sources of emissions of nitrogen oxides (''$NO_X$'') in certain States emit $NO_X$ in amounts that will contribute significantly to nonattainment in, or interfere with maintenance by, one or more States that submitted petitions in 1997 addressing such $NO_X$ emissions under section 126 of the Clean Air Act. (As used in this section, the term new source includes modified sources, as well.) The States that submitted such petitions are Connecticut, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont (each of which, hereinafter in this section, may be referred to also as a ''petitioning State''). Paragraph (j) of this section sets forth EPA's decisions about whether to grant or deny each of those petitions, and paragraph (k) of this section sets forth the emissions-reduction requirements that will apply to the affected $NO_X$ sources to the extent any of the petitions is granted. Appendix A of part 97 of this chapter contains a list of the existing $NO_X$ sources that as of date of signature are covered by the affirmative technical determinations described herein, and that would be required to meet such pollution-control requirements to the extent a petition covering such sources is granted.

(b) *Technical determinations relating to impacts on ozone levels in Connecticut.*—(1) *Affirmative technical determinations with respect to the 1-hour ozone standard in Connecticut.* The Administrator of EPA finds that any existing or new major source or group of stationary sources emits or would emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of Connecticut with respect to the 1-hour NAAQS for ozone if it is or will be:

(i) In a category of sources described in 40 CFR 97.4;

(ii) Located in one of the States (or portions thereof) listed in paragraph (b)(2) of this section; and

(iii) Within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Connecticut.

(2) *States or portions of states that contain sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in Connecticut.* The States, or portions of States, that contain sources for which EPA is making an affirmative technical determination are:

(i) Delaware.

(ii) District of Columbia.

(iii) Portion of Indiana located in OTAG Subregions 2 and 6, as shown in appendix F, Figure F–2 of this part.

(iv) Portion of Kentucky located in OTAG Subregion 6, as shown in appendix F, Figure F–2 of this part.

(v) Maryland.

(vi) Portion of Michigan located in OTAG Subregion 2, as shown in appendix F, Figure F–2 of this part.

(vii) Portion of North Carolina located in OTAG Subregion 7, as shown in appendix F, Figure F–2 of this part.

(viii) New Jersey.

(ix) Portion of New York extending west and south of Connecticut, as shown in appendix F, Figure F–2 of this part.

(x) Ohio.

(xi) Pennsylvania.

(xii) Virginia.

(xiii) West Virginia.

(3) *Negative technical determinations with respect to the 1-hour ozone standard in Connecticut.* The Administrator of EPA finds that any existing or new major source or group of stationary sources that is or will be located in one of the States (or portions thereof) listed in paragraph (b)(4) of this section does not or would not emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of Connecticut, with respect to the 1-hour NAAQS for ozone. The Administrator also finds that any existing or new major source or group of stationary sources does not or would not emit $NO_X$ in such amounts if it:

(i) Is or will be located in one of the States (or portions thereof) listed in paragraph (b)(2) of this section; and

(ii) Is or will be within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Connecticut; but

(iii) Is not in a category of sources described in 40 CFR 97.4.

(4) *States or portions of States that contain no sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in Connecticut.* The States or portions thereof described in paragraph (b)(3) of this section are:

(i) Portion of Tennessee located in OTAG Subregion 6, as shown in appendix F, Figure F–2.

(c) *Technical determinations relating to impacts on ozone levels in Maine.*—(1) *Affirmative technical determinations with respect to the 1-hour ozone standard in Maine.* The Administrator of EPA finds that any existing or new major source or group of stationary sources emits or would emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of Maine, with respect to the 1-hour NAAQS for ozone if it is or will be:

(I) In a category of sources described in 40 CFR 97.4;

(ii) Located in one of the States (or portions thereof) listed in paragraph (c)(2) of this section; and

(iii) Within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Maine.

(2) *States or portions of States that contain sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in Maine.* The States, or portions of States, that contain sources for which EPA is making an affirmative technical determination are:

(i) Connecticut.

(ii) Delaware.

(iii) District of Columbia.

(iv) Maryland.

(v) Massachusetts.
(vi) New Jersey.
(vii) New York.
(viii) Pennsylvania.
(ix) Rhode Island.

(3) *Negative technical determinations with respect to the 1-hour ozone standard in Maine.* The Administrator of EPA finds that any existing or new major source or group of stationary sources that is or will be located in one of the States (or portions thereof) listed in paragraph (c)(4) of this section does not or would not emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of Maine, with respect to the 1-hour NAAQS for ozone. The Administrator also finds that any existing or new major source or group of stationary sources that does not or would not emit $NO_X$ in such amounts if it:

(i) Is or will be located in one of the States (or portions thereof) listed in paragraph (c)(2) of this section; and

(ii) Is or will be within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Maine; but

(iii) Is not in a category of sources described in 40 CFR 97.4.

(4) *States or portions of States that contain no sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in Maine.* The States or portions thereof described in paragraph (c)(3) of this section are:

(i) Portion of North Carolina within a 600 mile radius of Maine's ozone nonattainment areas, as shown in appendix F, Figure F–3 of this part.
(ii) New Hampshire.
(iii) Portion of Ohio within a 600 mile radius of Maine's ozone nonattainment areas, as shown in appendix F, Figure F–3 of this part.
(iv) Vermont.
(v) Portion of Virginia within a 600 mile radius of Maine's ozone nonattainment areas, as shown in appendix F, Figure F–3 of this part.
(vi) Portion of West Virginia within a 600 mile radius of Maine's ozone nonattainment areas, as shown in appendix F, Figure F–3 of this part.

(d) *Technical determinations relating to impacts on ozone levels in Massachusetts.*—(1) *Affirmative technical determinations with respect to the 1-hour ozone standard in Massachusetts.* The Administrator of EPA finds that any existing or new major source or group of stationary sources emits or would emit NOx in amounts that contribute significantly to nonattainment in the State of Massachusetts, with respect to the 1-hour NAAQS for ozone if it is or will be:

(i) In a category of sources described in 40 CFR 97.4;

(ii) Located in one of the States (or portions thereof) listed in paragraph (d)(2) of this section; and

(iii) Within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Massachusetts.

(2) *States or portions of states that contain sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in Massachusetts.* The States or portions of States that contain sources for which EPA is making an affirmative technical determination are:

(i) All counties in Ohio located within a 3-county-wide band of the Ohio River, as shown in appendix F, Figure F–4 of this part.

(ii) All counties in West Virginia located within a 3-county-wide band of the Ohio River, as shown in appendix F, Figure F–4 of this part.

(3) *Negative technical determinations with respect to the 1-hour ozone standard in Massachusetts.* The Administrator of EPA finds that any existing or new major source or group of stationary sources that is or will be located in one of the States (or portions thereof) listed in paragraph (d)(4) of this section does not or would not emit NOx in amounts that contribute significantly to nonattainment in the State of Massachusetts, with respect to the 1-hour NAAQS for ozone. The Administrator also finds that any existing or new major source or group of stationary sources does not or would not emit NOx in such amounts if it:

(i) Is or will be located in one of the States (or portions thereof) listed in paragraph (d)(2) of this section; and

(ii) Is or will be within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Massachusetts; but

(iii) is not in a category of sources described in 40 CFR 97.4.

(4) *States or portions of States that contain no sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in Massachusetts.* The States or portions thereof described in paragraph (d)(3) of this section are:

(i) All counties in Kentucky located within a 3-county-wide band of the Ohio River, as shown in appendix F, Figure F–4 of this part.

(ii) All counties in Indiana located within a 3-county-wide band of the Ohio River, as shown in appendix F, Figure F–4 of this part.

(5) *Affirmative technical determinations with respect to the 8-hour ozone standard in Massachusetts.* The Administrator of EPA finds that any existing or new major source or group of stationary sources emits or would emit NOx in amounts that contribute significantly to nonattainment in, or interfere with maintenance by, the State of Massachusetts, with respect to the 8-hour NAAQS for ozone if it is or will be:

(i) In a category of sources described in 40 CFR 97.4;

(ii) Located in one of the States (or portions thereof) listed in paragraph (d)(6) of this section; and

(iii) Within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Massachusetts.

(6) *States or portions of states that contain sources for which EPA is making an affirmative technical determination with respect to the 8-hour ozone standard in Massachusetts.* The States, or portions of States, that contain sources for which EPA is making an affirmative technical determination are:

(i) All counties in Ohio located within a 3-county-wide band of the Ohio River, as shown in appendix F, Figure F–4 of this part.

(ii) All counties in West Virginia located within a 3-county-wide band of the Ohio River, as shown in appendix F, Figure F–4 of this part.

(7) *Negative technical determinations with respect to the 8-hour ozone standard in Massachusetts.* The Administrator of EPA finds that any existing or new major source or group of stationary sources that is or will be located in one of the States (or portions thereof) listed in paragraph (d)(8) of this section does not or would not emit $NO_X$ in amounts that contribute significantly to nonattainment in, or interfere with maintenance by, the State of Massachusetts, with respect to the 8-hour NAAQS for ozone. The Administrator also finds that any existing or new major source or group of stationary sources does not or would not emit $NO_X$ in such amounts if it is or will be:

(i) Is or will be located in one of the States (or portions thereof) listed in paragraph (d)(6) of this section; and

(ii) Is or will be within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Massachusetts; but

(iii) is not in a category of sources described in 40 CFR 97.4.

(8) *States or portions of States that contain no sources for which EPA is making an affirmative technical determination with respect to the 8-hour ozone standard in Massachusetts.* The States or portions thereof described in paragraph (d)(7) of this section are:

(i) All counties in Indiana located within a 3-county-wide band of the Ohio River, as shown in appendix F, Figure F–4 of this part.

(ii) All counties in Kentucky located within a 3-county-wide band of the Ohio River, as shown in appendix F, Figure F–4 of this part.

(e) *Technical determinations relating to impacts on ozone levels in New Hampshire.*—(1) *Affirmative technical determinations with respect to the 1-hour ozone standard in New Hampshire.* The Administrator of EPA finds that any existing or new major source or group of stationary sources emits or would emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of New Hampshire, with respect to the 1-hour NAAQS for ozone if it is or will be:

(i) In a category of sources described in 40 CFR 97.4;

(ii) Located in one of the States (or portions thereof) listed in paragraph (e)(2) of this section; and

(iii) Within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of New Hampshire.

(2) *States or portions of States that contain sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in New Hampshire.* The States, or portions of States, that contain sources for which EPA is making an affirmative technical determination are:

(i) Connecticut.
(ii) Delaware.
(iii) District of Columbia.
(iv) Maryland.
(v) Massachusetts.
(vi) New Jersey.
(vii) New York.
(viii) Pennsylvania.
(ix) Rhode Island.
(x) Virginia.

(3) *Negative technical determinations with respect to the 1-hour ozone standard in New Hampshire.* The Administrator of EPA finds that any existing or new major source or group of stationary sources that is or will be located in one of the States (or portions thereof) listed in paragraph (e)(4) of this section does not or would not emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of New Hampshire, with respect to the 1-hour NAAQS for ozone. The Administrator also finds that any existing or new major source or group of stationary sources does not or would not emit $NO_X$ in such amounts if it:

(i) Is or will be located in one of the States (or portions thereof) listed in paragraph (e)(2) of this section; and

(ii) Is or will be within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of New Hampshire; but

(iii) is not in a category of sources described in 40 CFR 97.4.

(4) *States or portions of States that contain no sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in New Hampshire.* The States or portions thereof described in paragraph (e)(3) of this section are:

(i) Illinois.
(ii) Indiana.
(iii) Portion of Iowa within OTAG Subregion 1, as shown in appendix F, Figure F–5 of this part.
(iv) Kentucky.
(v) Maine.
(vi) Portion of Michigan within OTAG Subregions 1 and 2, as shown in appendix F, Figure F–5 of this part.
(vii) Portion of Missouri within OTAG Subregion 5, as shown in appendix F, Figure F–5 of this part.
(viii) North Carolina.
(ix) Ohio.
(x) Tennessee.
(xi) West Virginia.
(xii) Portion of Wisconsin within OTAG Subregion 1, as shown in appendix F, Figure F–5 of this part.
(xiii) Vermont.

(f) *Technical determinations relating to impacts on ozone levels in the State of New York.*—(1) *Affirmative technical determinations with respect to the 1-hour ozone standard in the State of New York.* The Administrator of EPA finds that any existing or new major source or group of stationary sources emits or would emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of New York, with respect to the 1-hour NAAQS for ozone:

(i) In a category of sources described in 40 CFR 97.4;

(ii) Located in one of the States (or portions thereof) listed in paragraph (f)(2) of this section; and

(iii) Within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of New York.

(2) *States or portions of States that contain sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in the State of New York.* The States, or portions of States, that contain sources for which EPA is making an affirmative technical determination are:

(i) Delaware.
(ii) District of Columbia.
(iii) Portion of Indiana located in OTAG Subregions 2 and 6, as shown in appendix F, Figure F–6 of this part.
(iv) Portion of Kentucky located in OTAG Subregion 6, as shown in appendix F, Figure F–6 of this part.
(v) Maryland.
(vi) Portion of Michigan located in OTAG Subregion 2, as shown in appendix F, Figure F–6 of this part.
(vii) Portion of North Carolina located in OTAG Subregions 6 and 7, as shown in appendix F, Figure F–6 of this part.
(viii) New Jersey.
(ix) Ohio.
(x) Pennsylvania.
(xi) Virginia.
(xii) West Virginia.

(3) *Negative technical determinations with respect to the 1-hour ozone standard in the State of New York.* The Administrator of EPA finds that any existing or new major source or group of stationary sources that is or will be located in one of the States (or portions thereof) listed in paragraph (f)(4) of this section does not or would not emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of New York, with respect to the 1-hour NAAQS for ozone. The Administrator also finds that any existing or new major source or group of stationary sources does not or would not emit $NO_X$ in such amounts if it:

(i) Is or will be located in one of the States (or portions thereof) listed in paragraph (f)(2) of this section; and

(ii) Is or will be within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of New York; but

(iii) Is not in a category of sources described in 40 CFR 97.4.

(4) *States or portions of States that contain no sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in the State of New York.* The States or portions thereof described in paragraph (f)(3) of this section are:

(i) Portion of Tennessee located in OTAG Subregion 6, as shown in appendix F, Figure F–6 of this part.

(g) *Technical determinations relating to impacts on ozone levels in Pennsylvania.*—(1) *Affirmative*

*technical determinations with respect to the 1-hour ozone standard in Pennsylvania.* The Administrator of EPA finds that any existing or new major source or group of stationary sources emits or would emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of Pennsylvania, with respect to the 1-hour NAAQS for ozone if it is or will be:

(i) In a category of sources described in 40 CFR 97.4;

(ii) Located in one of the States (or portions thereof) listed in paragraph (g)(2) of this section; and

(iii) Within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Pennsylvania.

(2) *States or portions of States that contain sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in Pennsylvania.* The States, or portions of States, that contain sources for which EPA is making an affirmative technical determination are:

(i) North Carolina.

(ii) Ohio.

(iii) Virginia.

(iv) West Virginia.

(3) *Negative technical determinations with respect to the 1-hour ozone standard in Pennsylvania.* The Administrator of EPA finds that any existing or new major source or group of stationary sources that is or will be located in one of the States (or portions thereof) listed in paragraph (g)(4) of this section does not or would not emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of Pennsylvania, with respect to the 1-hour NAAQS for ozone. The Administrator also finds that any existing or new major source or group of stationary sources does not or would not emit $NO_X$ in such amounts if it:

(i) Is or will be located in one of the States (or portions thereof) listed in paragraph (g)(2) of this section; and

(ii) Is or will be within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Pennsylvania; but

(iii) Is not in a category of sources described in 40 CFR 97.4.

(4) *States or portions of States that contain no sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in Pennsylvania.* The States or portions thereof described in paragraph (g)(3) of this section are:

(i) Alabama.

(ii) Arkansas.

(iii) Georgia.

(iv) Illinois.

(v) Indiana

(vi) Iowa.

(vii) Kentucky.

(viii) Louisiana.

(ix) Michigan.

(x) Minnesota.

(xi) Mississippi.

(xii) Missouri.

(xiii) South Carolina.

(xiv) Tennessee.

(xv) Wisconsin.

(5) *Affirmative technical determinations with respect to the 8-hour ozone standard in Pennsylvania.* The Administrator of EPA finds that any existing or new major source or group of stationary sources emits or would emit $NO_X$ in amounts that contribute significantly to nonattainment in, or interfere with maintenance by, the State of Pennsylvania, with respect to the 8-hour NAAQS for ozone:

(i) In a category of sources described in 40 CFR 97.4;

(ii) Located in one of the States (or portions thereof) listed in paragraph (g)(6) of this section; and

(iii) Within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Pennsylvania.

(6) *States or portions of States that contain sources for which EPA is making an affirmative technical determination with respect to the 8-hour ozone standard in Pennsylvania.* The States, or portions of States, that contain sources for which EPA is making an affirmative technical determination are:

(i) Alabama.

(ii) Illinois.

(iii) Indiana.

(iv) Kentucky.

(v) Michigan.

(vi) Missouri.

(vii) North Carolina.

(viii) Ohio.

(ix) Tennessee.

(x) Virginia.

(xi) West Virginia.

(7) *Negative technical determinations with respect to the 8-hour ozone standard in Pennsylvania.* The Administrator of EPA finds that any existing or new major source or group of stationary sources that is or will be located in one of the States (or portions thereof) listed in paragraph (g)(8) of this section does not or would not emit $NO_X$ in amounts that contribute significantly to nonattainment in, or interfere with maintenance by, the State of Pennsylvania, with respect to the 8-hour NAAQS for ozone. The Administrator also finds that any existing or new major source or group of stationary sources does not or would not emit $NO_X$ in such amounts if it:

(i) Is or will be located in one of the States (or portions thereof) listed in paragraph (g)(6) of this section; and

(ii) Is or will be within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Pennsylvania; but

(iii) Is not in a category of sources described in 40 CFR 97.4.

(8) *States or portions of States that contain no sources for which EPA is making an affirmative technical determination with respect to the 8-hour ozone standard in Pennsylvania.* The States or portions thereof described in paragraph (g)(7) of this section are:

(i) Arkansas.

(ii) Georgia.

(iii) Iowa.

(iv) Louisiana.

(v) Minnesota.

(vi) Mississippi.

(vii) South Carolina.

(viii) Wisconsin.

(h) *Technical determinations relating to impacts on ozone levels in Rhode Island.*—(1) *Affirmative technical determinations with respect to the 1-hour ozone standard in Rhode Island.* The Administrator of EPA finds that any existing or new major source or group of stationary sources emits or would emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of Rhode Island, with respect to the 1-hour NAAQS for ozone if it is or will be:

(i) In a category of sources described in 40 CFR 97.4;

(ii) Located in one of the States (or portions thereof) listed in paragraph (h)(2) of this section; and

(iii) Within one of the ''Named Source Categories'' listed in the portion of Table F–1 in appendix F of this part describing the sources covered by the petition of the State of Rhode Island.

(2) *States or portions of States that contain sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in Rhode Island.* The States, or portions of States, that contain sources for which EPA is making an affirmative technical determination are:

(i) All counties in Ohio located within a 3-county-wide band of the Ohio River, as shown in appendix F, Figure F–8 of this part.

(ii) All counties in West Virginia located within a 3-county-wide band of the Ohio River, as shown in appendix F, Figure F–8 of this part.

(3) *Negative technical determinations with respect to the 1-hour ozone*

*standard in Rhode Island.* The Administrator of EPA finds that any existing or new major source or group of stationary sources that is or will be located in one of the States (or portions thereof) listed in paragraph (h)(4) of this section does not or would not emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of Rhode Island, with respect to the 1-hour NAAQS for ozone. The Administrator also finds that any existing or new major source or group of stationary sources does not or would not emit $NO_X$ in such amounts if it:

(i) Is or will be located in one of the States (or portions thereof) listed in paragraph (h)(2) of this section; and

(ii) Is or will be within one of the ''Named Source Categories'' listed in the portion of Table F–1 in Appendix F of this part describing the sources covered by the petition of the State of Rhode Island; but

(iii) Is not in a category of sources described in 40 CFR 97.4.

(4) *States or portions of States that contain no sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in Rhode Island.* The States or portions thereof described in paragraph (h)(3) of this section are:

(i) All counties in Kentucky located within a 3-county-wide band of the Ohio River, as shown in appendix F, Figure F–8 of this part.

(ii) All counties in Indiana located within a 3-county wide-band of the Ohio River, as shown in appendix F, Figure F–8 of this part.

(i) *Technical determinations relating to impacts on ozone levels in Vermont.*—(1) *Negative technical determinations with respect to the 1-hour ozone standard in Vermont.* The Administrator of EPA finds that any existing or new major source or group of stationary sources that is or will be located in one of the States (or portions thereof) listed in paragraph (i)(2) of this section does not or would not emit $NO_X$ in amounts that contribute significantly to nonattainment in the State of Vermont, with respect to the 1-hour NAAQS for ozone.

(2) *States or portions of States that contain no sources for which EPA is making an affirmative technical determination with respect to the 1-hour ozone standard in Vermont.* The States or portions thereof described in paragraph (i)(1) of this section are:

(i) Portion of Alabama within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(ii) Portion of Connecticut within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(iii) Delaware.

(iv) District of Columbia.

(v) Portion of Georgia within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(vi) Illinois.

(vii) Indiana.

(viii) Portion of Iowa within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(ix) Kentucky.

(x) Maryland.

(xi) Portion of Massachusetts within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(xii) Portion of Michigan within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(xiii) Portion of Missouri within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(xiv) New Jersey.

(xv) Portion of New York within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(xvi) North Carolina.

(xvii) Ohio.

(xviii) Pennsylvania.

(xix) South Carolina.

(xx) Portion of Tennessee within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(xxi) Virginia.

(xxii) West Virginia.

(xxiii) Portion of Wisconsin within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(3) *Negative technical determinations with respect to the 8-hour ozone standard in Vermont.* The Administrator of EPA finds that any existing or new major source or group of stationary sources that is or will be located in one of the States (or portions thereof) listed in paragraph (i)(4) of this section does not or would not emit $NO_X$ in amounts that contribute significantly to nonattainment in, or interfere with maintenance by, the State of Vermont, with respect to the 8-hour NAAQS for ozone.

(4) *States or portions of States that contain no sources for which EPA is making an affirmative technical determination with respect to the 8-hour ozone standard in Vermont.* The States or portions thereof described in paragraph (i)(3) of this section are:

(i) Portion of Alabama within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(ii) Portion of Connecticut within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(iii) Delaware.

(iv) District of Columbia.

(v) Portion of Georgia within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(vi) Illinois.

(vii) Indiana.

(viii) Portion of Iowa within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(ix) Kentucky.

(x) Maryland.

(xi) Portion of Massachusetts within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(xii) Portion of Michigan within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(xiii) Portion of Missouri within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(xiv) New Jersey.

(xv) Portion of New York within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(xvi) North Carolina.

(xvii) Ohio.

(xviii) Pennsylvania.

(xix) South Carolina.

(xx) Portion of Tennessee within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(xxi) Virginia.

(xxii) West Virginia.

(xxiii) Portion of Wisconsin within 1000 miles southwest from Bennington, VT, as shown in appendix F, Figure F–9 of this part.

(j) *Action on petitions for section 126(b) findings.* (1) For each existing or new major source or group of stationary sources for which the Administrator has made an affirmative technical determination as described in paragraphs (b) through (i) of this section as to impacts on nonattainment or maintenance of a particular NAAQS for ozone in a particular petitioning State, a finding of the Administrator that each such major source or group of stationary sources emits or would emit $NO_X$ in violation of the prohibition of Clean Air Act section 110(a)(2)(D)(i)(I) with the respect to nonattainment or maintenance of such standard in such petitioning State will be deemed to be made:

(i) As of November 30, 1999, if by such date EPA does not issue either:

(A) A proposed approval, under section 110(k) of the Clean Air Act, of a State implementation plan revision submitted by such State to comply with the requirements of section 110(a)(2)(D)(i)(I) of the Clean Air Act; or

(B) A final Federal implementation plan meeting such requirements for such State.

(ii) As of May 1, 2000, if by November 30, 1999, EPA takes the action described in paragraph (j)(1)(i) of this section for such State, but, by May 1, 2000, EPA does not approve or promulgate implementation plan provisions meeting such requirements for such State.

(2) The making of any such finding as to any such major source or group of stationary sources shall be considered to be the making of a finding under subsection (b) of section 126 of the Clean Air Act as to such major source or group of stationary sources. Each aspect of a petition as to which the Administrator has made an affirmative technical determination (as described in paragraphs (b) through (i) of this section) shall be deemed denied as of May 1, 2000, if a section 126(b) finding has not been deemed to have been made by that date. Notwithstanding any other provision of this paragraph or section, after such a finding has been deemed to be made under this paragraph as to a particular major source or group of stationary sources in a particular State, such finding will be deemed to be withdrawn, and the corresponding part of the relevant petition(s) denied, if the Administrator issues a final action putting in place implementation plan provisions that comply with the requirements of section 110(a)(2)(D)(i)(I) of the Clean Air Act for such State.

(3) For each new or existing major source or group of stationary sources for which the Administrator has made a negative technical determination in any of paragraphs (b) through (i) of this section as to impacts on a particular petitioning State with respect to a particular NAAQS for ozone, the Administrator hereby denies the petition of such petitioning State and determines that such new or existing major source or group of stationary sources does not emit or would not emit in violation of the prohibition in Clean Air Act section 110(a)(2)(D)(i)(I) with respect to impacts on nonattainment or maintenance of such standard in such petitioning State.

(k) The provisions of part 97 of this chapter apply to the owner or operator of any new or existing major source, or other source within any group of stationary sources, as to which the Administrator makes a finding under section 126(b) of the Clean Air Act pursuant to the provisions of paragraph (j) of this section.

3. Appendix F is added to part 52 to read as follows:

**Appendix F to This Part—Clean Air Act Section 126 Petitions From Eight Northeastern States: Named Source Categories and Geographic Coverage**

The table and figures in this appendix are cross-referenced in § 52.34.

TABLE F–1.—NAMED SOURCE CATEGORIES IN SECTION 126 PETITIONS

| Petitioning State | Named source categories |
|---|---|
| Connecticut | Fossil fuel-fired boilers or other indirect heat exchangers with a maximum gross heat input rate of 250 mmBtu/hr or greater and electric utility generating facilities with a rated output of 15 MW or greater. |
| Maine | Electric utilities and steam-generating units with a heat input capacity of 250 mmBtu/hr or greater. |
| Massachusetts | Electricity generating plants. |
| New Hampshire | Fossil fuel-fired indirect heat exchange combustion units and fossil fuel-fired electric generating facilities which emit ten tons of $NO_X$ or more per day. |
| New York | Fossil fuel-fired boilers or indirect heat exchangers with a maximum heat input rate of 250 mmBtu/hr or greater and electric utility generating facilities with a rated output of 15 MW or greater. |
| Pennsylvania | Fossil fuel-fired indirect heat exchange combustion units with a maximum rated heat input capacity of 250 mmBtu/hr or greater, and fossil fuel-fired electric generating facilities rated at 15 MW or greater. |
| Rhode Island | Electricity generating plants. |
| Vermont | Fossil fuel-fired electric utility generating facilities with a maximum gross heat input rate of 250 mmBtu/hr or greater and potentially other unidentified major sources. |

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Figure F-1. Location of Ozone Transport Assessment Group (OTAG) Subregions

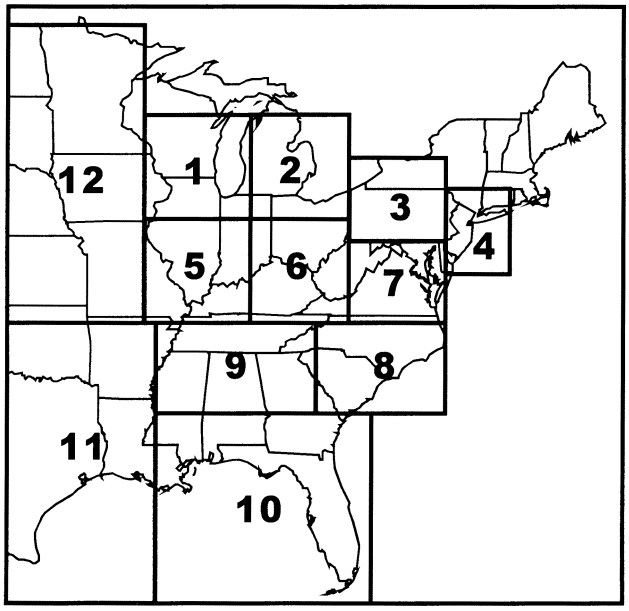



Figure F-2. Areas covered by the Section 126 petition from Connecticut

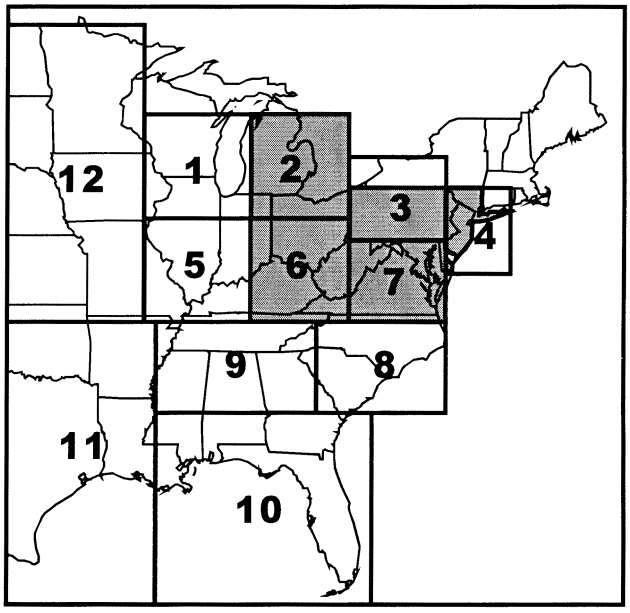


Figure F-3. Areas covered by the Section 126 petition from Maine

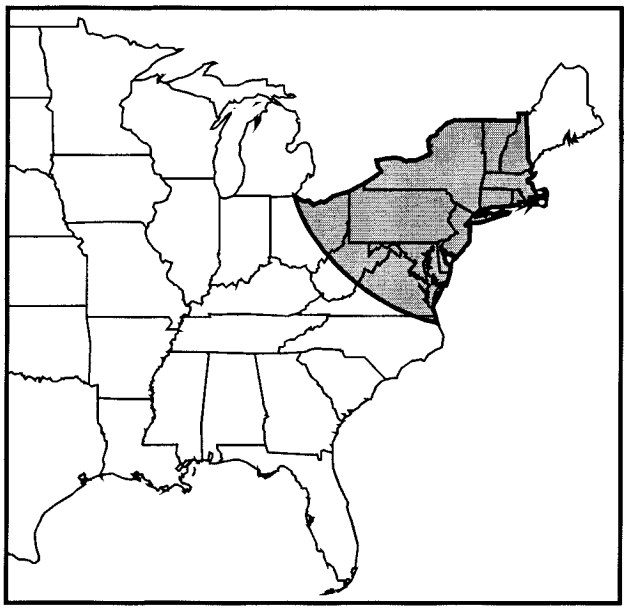


Figure F-4. Areas covered by the Section 126 petition from Massachusetts

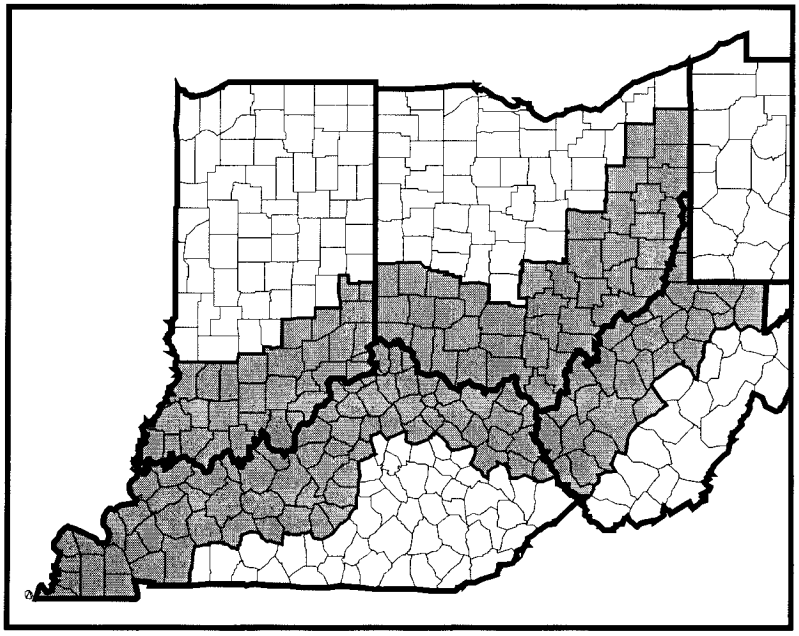


Figure F-5. Areas covered by the Section 126 petition from New Hampshire

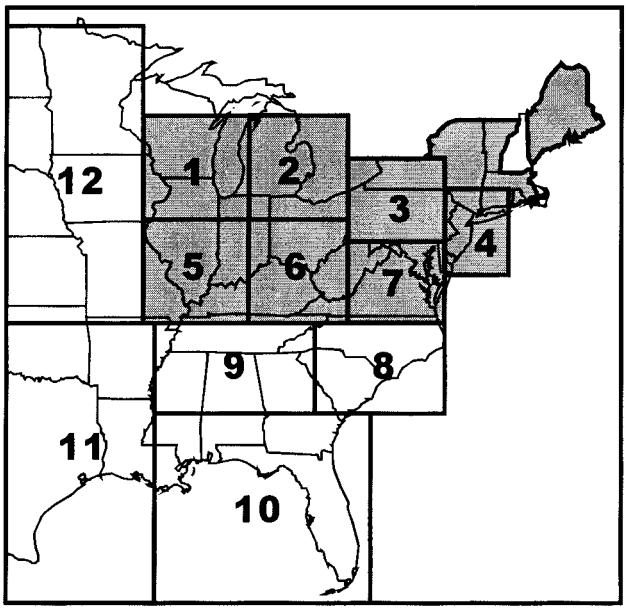



Figure F-6. Areas covered by the Section 126 petition from New York

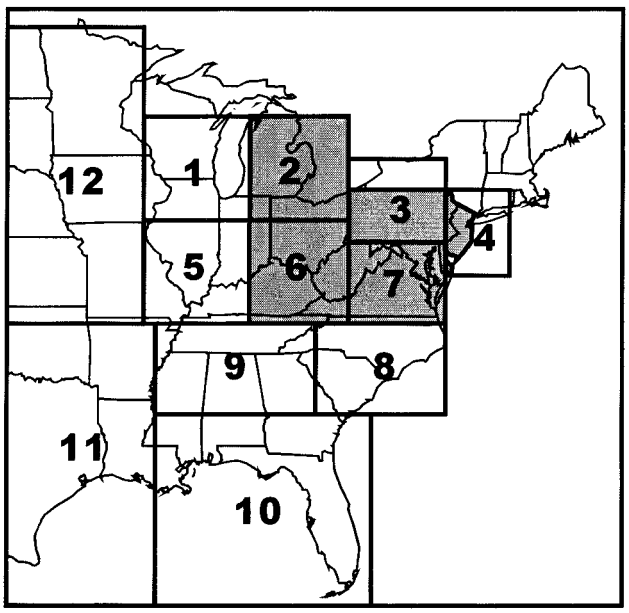


Figure F-7. Areas covered by the Section 126 petition from Pennsylvania

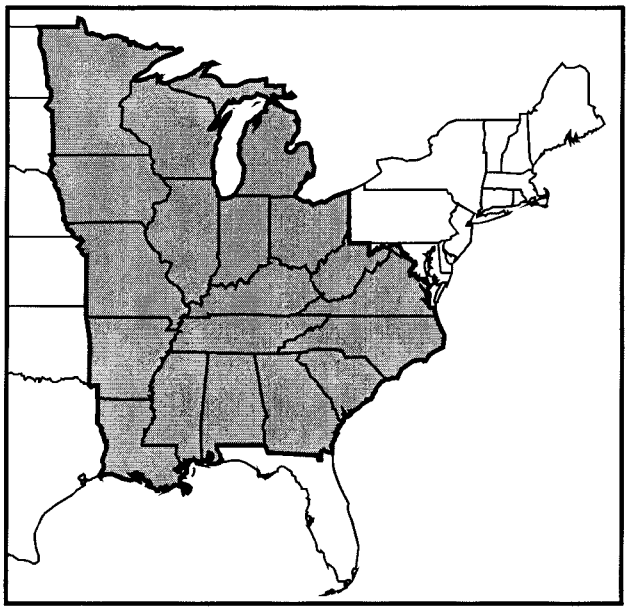


Figure F-8. Areas covered by the Section 126 petition from Rhode Island

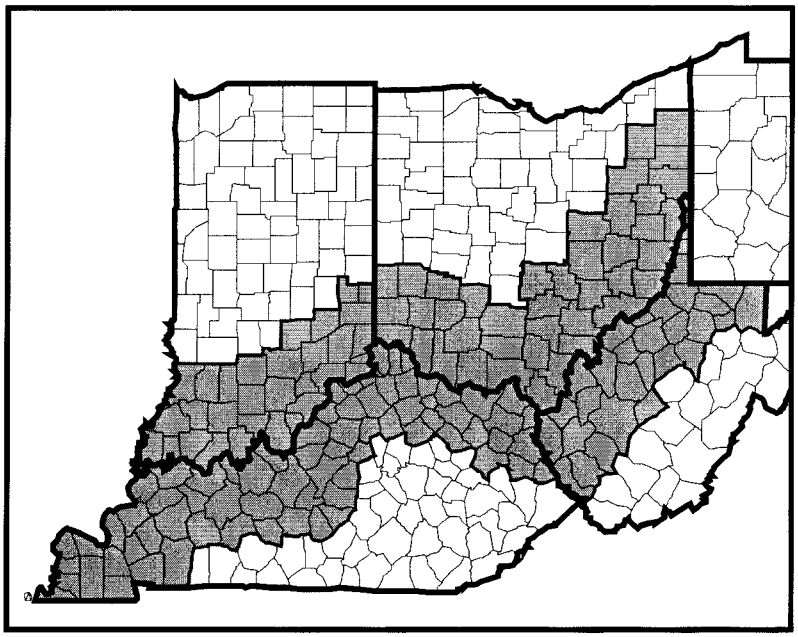
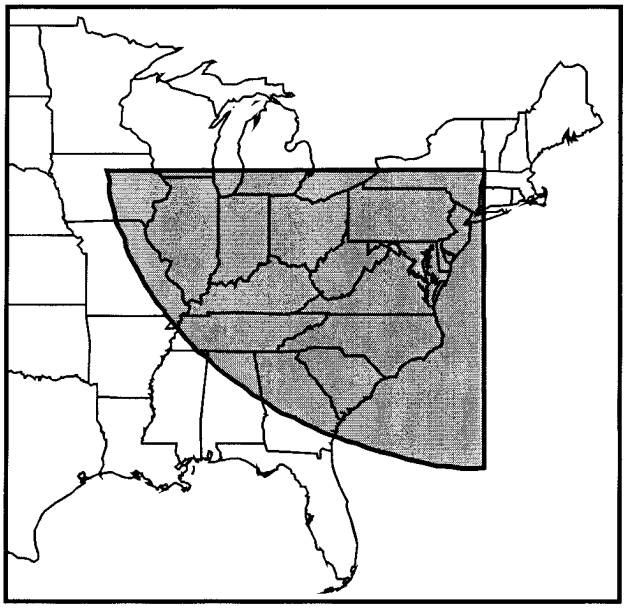


Figure F-9. Areas covered by the Section 126 petition from Vermont



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## PART 97—FEDERAL $NO_X$ BUDGET TRADING PROGRAM

4. Part 97 is added to read as follows:

### Subpart A—Federal $NO_X$ Budget Trading Program General Provisions

Sec.
97.1 Purpose.
97.2 Definitions.
97.3 Measurements, abbreviations, and acronyms.
97.4 Applicability.
97.5 Retired unit exemption.
97.6 Standard requirements.
97.7 Computation of time.

### Subpart B—$NO_X$ Authorized Account Representative for $NO_X$ Budget Sources

97.10 Authorization and responsibilities of the $NO_X$ authorized account representative.
97.11 Alternate $NO_X$ authorized account representative.
97.12 Changing the $NO_X$ authorized account representative, and the alternate $NO_X$ authorized account representative; changes in the owners and operators.
97.13 Account certificate of representation.
97.14 Objections concerning the $NO_X$ authorized account representative.

### Subpart C—Permits

97.20 General $NO_X$ budget trading program permit requirements.
97.21 $NO_X$ Budget permit applications.
97.22 Information requirements for $NO_X$ Budget permit applications.
97.23 $NO_X$ Budget permit contents.
97.24 Effective date of initial $NO_X$ Budget permit.
97.25 $NO_X$ Budget permit revisions.

### Subpart D—Compliance Certification

97.30 Compliance certification report.
97.31 Administrator's action on compliance certifications.

### Subpart E—$NO_X$ Allowance Allocations

97.40 Trading program budget.
97.41 Timing requirements for $NO_X$ allowance allocations.
97.42 $NO_X$ allowance allocations.

### Subpart F—$NO_X$ Allowance Tracking System

97.50 $NO_X$ Allowance Tracking System accounts.
97.51 Establishment of accounts.
97.52 $NO_X$ Allowance Tracking System responsibilities of $NO_X$ authorized account representative.
97.53 Recordation of $NO_X$ allowance allocations.
97.54 Compliance.
97.55 Banking.
97.56 Account error.
97.57 Closing of general accounts.

### Subpart G—$NO_X$ Allowance Transfers

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97.61 EPA recordation.
97.62 Notification.

### Subpart H—Monitoring and Reporting

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97.71 Initial certification and recertification procedures.
97.72 Out of control periods.
97.73 Notifications.
97.74 Recordkeeping and reporting.
97.75 Petitions.
97.76 Additional requirements to provide heat data imput.

### Subpart I—Individual Unit Opt-ins

97.80 Applicability.
97.81 General.
97.82 Applying for $NO_X$ authorized account representative.
97.83 Applying for $NO_X$ Budget opt-in permit.
97.84 Opt-in process.
97.85 $NO_X$ Budget opt-in permit contents.
97.86 Withdrawal from $NO_X$ Budget Trading Program.
97.87 Change in regulatory status.
97.88 $NO_X$ allowance allocations to opt-in units.
Appendix A to Part 97—$NO_X$ Allowance Allocation Tables for Affected Sources Under Section 126 of the Act
Appendix B to Part 97—$NO_X$ Allowance Allocation Tables for Affected Sources Under Section 110 of the Act in Georgia, South Carolina, and Wisconsin
Appendix C to Part 97—State-By-State Maximum Summer $NO_X$ Emission Levels and Allocation Aggregates

**Authority:** 42 U.S.C. 7401, 7403, 7410, and 7601.

### Subpart A—Federal $NO_X$ Budget Trading Program General Provisions

#### § 97.1 Purpose.

This part establishes general provisions and the applicability, permitting, allowance, excess emissions, monitoring, and opt-in provisions for the federal $NO_X$ Budget Trading Program, under section 110(c) or section 126 of the Act, as a means of mitigating the interstate transport of ozone and nitrogen oxides, an ozone precursor. The owner or operator of a unit, or any other person, shall comply with

requirements of this part as a matter of federal law only if such compliance is required by § 52.34 or § 52.35 of this chapter.

**§ 97.2 Definitions.**

The terms used in this part shall have the meanings set forth in this section as follows:

*Account certificate of representation* means the completed and signed submission required by subpart B of this part for certifying the designation of a $NO_X$ authorized account representative for a $NO_X$ Budget source or a group of identified $NO_X$ Budget sources who is authorized to represent the owners and operators of such source or sources and of the $NO_X$ Budget units at such source or sources with regard to matters under the $NO_X$ Budget Trading Program.

*Account number* means the identification number given by the Administrator to each $NO_X$ Allowance Tracking System account.

*Acid Rain emissions limitation* means, as defined in § 72.2 of this chapter, a limitation on emissions of sulfur dioxide or nitrogen oxides under the Acid Rain Program under title IV of the Clean Air Act.

*Administrator* means the Administrator of the United States Environmental Protection Agency or the Administrator's duly authorized representative.

*Allocate* or *allocation* means the determination by the permitting authority or the Administrator of the number of $NO_X$ allowances to be initially credited to a $NO_X$ Budget unit or an allocation set-aside.

*Automated data acquisition and handling system* or *DAHS* means that component of the CEMS, or other emissions monitoring system approved for use under subpart H of this part, designed to interpret and convert individual output signals from pollutant concentration monitors, flow monitors, diluent gas monitors, and other component parts of the monitoring system to produce a continuous record of the measured parameters in the measurement units required by subpart H of this part.

*Boiler* means an enclosed fossil or other fuel-fired combustion device used to produce heat and to transfer heat to recirculating water, steam, or other medium.

*Clean Air Act* means the Clean Air Act, 42 U.S.C. 7401, *et seq.*, as amended by Pub. L. No. 101–549 (November 15, 1990).

*Combined cycle system* means a system comprised of one or more combustion turbines, heat recovery steam generators, and steam turbines configured to improve overall efficiency of electricity generation or steam production.

*Combustion turbine* means an enclosed fossil or other fuel-fired device that is comprised of a compressor, a combustor, and a turbine, and in which the flue gas resulting from the combustion of fuel in the combustor passes through the turbine, rotating the turbine.

*Commence commercial operation* means, with regard to a unit that serves a generator, to have begun to produce steam, gas, or other heated medium used to generate electricity for sale or use, including test generation. Except as provided in § 97.5, for a unit that is a $NO_X$ Budget unit under § 97.4 on the date the unit commences commercial operation, such date shall remain the unit's date of commencement of commercial operation even if the unit is subsequently modified, reconstructed, or repowered. Except as provided in § 97.5 or subpart I of this part, for a unit that is not a $NO_X$ Budget unit under § 97.4 on the date the unit commences commercial operation, the date the unit becomes a $NO_X$ Budget unit under § 97.4 shall be the unit's date of commencement of commercial operation.

*Commence operation* means to have begun any mechanical, chemical, or electronic process, including, with regard to a unit, start-up of a unit's combustion chamber. Except as provided in § 97.5, for a unit that is a $NO_X$ Budget unit under § 97.4 on the date of commencement of operation, such date shall remain the unit's date of commencement of operation even if the unit is subsequently modified, reconstructed, or repowered. Except as provided in § 97.5 or subpart I of this part, for a unit that is not a $NO_X$ Budget unit under § 97.4 on the date of commencement of operation, the date the unit becomes a $NO_X$ Budget unit under § 97.4 shall be the unit's date of commencement of operation.

*Common stack* means a single flue through which emissions from two or more units are exhausted.

*Compliance certification* means a submission to the permitting authority or the Administrator, as appropriate, that is required under subpart D of this part to report a $NO_X$ Budget source's or a $NO_X$ Budget unit's compliance or noncompliance with this part and that is signed by the $NO_X$ authorized account representative in accordance with subpart B of this part.

*Compliance account* means a $NO_X$ Allowance Tracking System account, established by the Administrator for a $NO_X$ Budget unit under subpart F of this part, in which the $NO_X$ allowance allocations for the unit are initially recorded and in which are held $NO_X$ allowances available for use by the unit for a control period for the purpose of meeting the unit's $NO_X$ Budget emissions limitation.

*Continuous emission monitoring system* or *CEMS* means the equipment required under subpart H of this part to sample, analyze, measure, and provide, by readings taken at least once every 15 minutes of the measured parameters, a permanent record of nitrogen oxides emissions, expressed in tons per hour for nitrogen oxides. The following systems are component parts included, consistent with part 75 of this chapter, in a continuous emission monitoring system:

(1) Flow monitor;

(2) Nitrogen oxides pollutant concentration monitors;

(3) Diluent gas monitor (oxygen or carbon dioxide) when such monitoring is required by subpart H of this part;

(4) A continuous moisture monitor when such monitoring is required by subpart H of this part; and

(5) An automated data acquisition and handling system.

*Control period* means the period beginning May 1 of a year and ending on September 30 of the same year, inclusive.

*Emissions* means air pollutants exhausted from a unit or source into the atmosphere, as measured, recorded, and reported to the Administrator by the $NO_X$ authorized account representative and as determined by the Administrator in accordance with subpart H of this part.

*Energy Information Administration* means the Energy Information Administration of the United States Department of Energy.

*Excess emissions* means any tonnage of nitrogen oxides emitted by a $NO_X$ Budget unit during a control period that exceeds the $NO_X$ Budget emissions limitation for the unit.

*Fossil fuel* means natural gas, petroleum, coal, or any form of solid, liquid, or gaseous fuel derived from such material.

*Fossil fuel-fired* means, with regard to a unit:

(1)The combustion of fossil fuel, alone or in combination with any other fuel, where fossil fuel actually combusted comprises more than 50 percent of the annual heat input on a Btu basis during any year starting in 1995 or, if a unit had no heat input starting in 1995, during the last year of operation of the unit prior to 1995; or

(2)The combustion of fossil fuel, alone or in combination with any other fuel,

where fossil fuel is projected to comprise more than 50 percent of the annual heat input on a Btu basis during any year; provided that the unit shall be ''fossil fuel-fired'' as of the date, during such year, on which the unit begins combusting fossil fuel.

*General account* means a $NO_X$ Allowance Tracking System account, established under subpart F of this part, that is not a compliance account or an overdraft account.

*Generator* means a device that produces electricity.

*Heat input* means the product (in mmBtu/time) of the gross calorific value of the fuel (in Btu/lb) and the fuel feed rate into a combustion device (in mass of fuel/time), as measured, recorded, and reported to the Administrator by the $NO_X$ authorized account representative and as determined by the Administrator in accordance with subpart H of this part, and does not include the heat derived from preheated combustion air, recirculated flue gases, or exhaust from other sources.

*Life-of-the-unit, firm power contractual arrangement* means a unit participation power sales agreement under which a utility or industrial customer reserves, or is entitled to receive, a specified amount or percentage of nameplate capacity and associated energy from any specified unit and pays its proportional amount of such unit's total costs, pursuant to a contract:

(1) For the life of the unit;

(2) For a cumulative term of no less than 30 years, including contracts that permit an election for early termination; or

(3) For a period equal to or greater than 25 years or 70 percent of the economic useful life of the unit determined as of the time the unit is built, with option rights to purchase or release some portion of the nameplate capacity and associated energy generated by the unit at the end of the period.

*Maximum design heat input* means the ability of a unit to combust a stated maximum amount of fuel per hour on a steady state basis, as determined by the physical design and physical characteristics of the unit.

*Maximum potential hourly heat input* means an hourly heat input used for reporting purposes when a unit lacks certified monitors to report heat input. If the unit intends to use appendix D of part 75 of this chapter to report heat input, this value should be calculated, in accordance with part 75 of this chapter, using the maximum fuel flow rate and the maximum gross calorific value. If the unit intends to use a flow monitor and a diluent gas monitor, this value should be reported, in accordance with part 75 of this chapter, using the maximum potential flowrate and either the maximum carbon dioxide concentration (in percent $CO_2$) or the minimum oxygen concentration (in percent $O_2$).

*Maximum potential $NO_X$* emission rate means the emission rate of nitrogen oxides (in lb/mmBtu) calculated in accordance with section 3 of appendix F of part 75 of this chapter, using the maximum potential nitrogen oxides concentration as defined in section 2 of appendix A of part 75 of this chapter, and either the maximum oxygen concentration (in percent $O_2$) or the minimum carbon dioxide concentration (in percent $CO_2$), under all operating conditions of the unit except for unit start up, shutdown, and upsets.

*Maximum rated hourly heat input* means a unit specific maximum hourly heat input (mmBtu) which is the higher of the manufacturers maximum rated hourly heat input or the highest observed hourly heat input.

*Monitoring system* means any monitoring system that meets the requirements of subpart H of this part, including a continuous emissions monitoring system, an excepted monitoring system, or an alternative monitoring system.

*Most stringent State or Federal $NO_X$ emissions limitation* means, with regard to a $NO_X$ Budget opt-in source, the lowest $NO_X$ emissions limitation (in terms of lb/mmBtu) that is applicable to the unit under State or Federal law, regardless of the averaging period to which the emissions limitation applies.

*Nameplate capacity* means the maximum electrical generating output (in MWe) that a generator can sustain over a specified period of time when not restricted by seasonal or other deratings as measured in accordance with the United States Department of Energy standards.

*Non-title V permit* means a federally enforceable permit administered by the permitting authority pursuant to the Clean Air Act and regulatory authority under the Clean Air Act, other than title V of the Clean Air Act and part 70 or 71 of this chapter.

*$NO_X$ allowance* means an authorization by the permitting authority or the Administrator under the $NO_X$ Budget Trading Program to emit up to one ton of nitrogen oxides during the control period of the specified year or of any year thereafter.

*$NO_X$ allowance deduction* or *deduct $NO_X$* allowances means the permanent withdrawal of $NO_X$ *allowances* by the Administrator from a $NO_X$ Allowance Tracking System compliance account or overdraft account to account for the number of tons of $NO_X$ emissions from a $NO_X$ Budget unit for a control period, determined in accordance with subparts H and F of this part, or for any other allowance surrender obligation under this part.

*$NO_X$ allowances held* or *hold $NO_X$* allowances means the $NO_X$ allowances recorded by the Administrator, or submitted to the Administrator for recordation, in accordance with subparts F and G of this part, in a $NO_X$ Allowance Tracking System account.

*$NO_X$ Allowance Tracking System* means the system by which the Administrator records allocations, deductions, and transfers of $NO_X$ allowances under the $NO_X$ Budget Trading Program.

*$NO_X$ Allowance Tracking System account* means an account in the $NO_X$ Allowance Tracking System established by the Administrator for purposes of recording the allocation, holding, transferring, or deducting of $NO_X$ allowances.

*$NO_X$ allowance transfer deadline* means midnight of November 30 or, if November 30 is not a business day, midnight of the first business day thereafter and is the deadline by which $NO_X$ allowances may be submitted for recordation in a $NO_X$ Budget unit's compliance account, or the overdraft account of the source where the unit is located, in order to meet the unit's $NO_X$ Budget emissions limitation for the control period immediately preceding such deadline.

*$NO_X$ authorized account representative* means, for a $NO_X$ Budget source or $NO_X$ Budget unit at the source, the natural person who is authorized by the owners and operators of the source and all $NO_X$ Budget units at the source, in accordance with subpart B of this part, to represent and legally bind each owner and operator in matters pertaining to the $NO_X$ Budget Trading Program or, for a general account, the natural person who is authorized, in accordance with subpart F of this part, to transfer or otherwise dispose of $NO_X$ allowances held in the general account.

*$NO_X$ Budget emissions limitation* means, for a $NO_X$ budget unit, the tonnage equivalent of the $NO_X$ allowances available for compliance deduction for the unit under § 97.54 (a) and (b) in a control period adjusted by deductions of such $NO_X$ allowances to account for actual utilization under § 97.42(e) for the control period, or to account for excess emissions for a prior control period under § 97.54(d) or to account for withdrawal from the $NO_X$ budget trading program or for a change

in regulatory states, of a $NO_X$ budget opt-in source under § 97.86 or § 97.88.

*$NO_X$ Budget opt-in permit* means a $NO_X$ Budget permit covering a $NO_X$ Budget opt-in source.

*$NO_X$ Budget opt-in source* means a unit that has been elected to become a $NO_X$ Budget unit under the $NO_X$ Budget Trading Program and whose $NO_X$ budget opt-in permit has been issued and is in effect under subpart I of this part.

*$NO_X$ Budget permit* means the legally binding and federally enforceable written document, or portion of such document, issued by the permitting authority under this part, including any permit revisions, specifying the $NO_X$ Budget Trading Program requirements applicable to a $NO_X$ Budget source, to each $NO_X$ Budget unit at the $NO_X$ Budget source, and to the owners and operators and the $NO_X$ authorized account representative of the $NO_X$ Budget source and each $NO_X$ Budget unit.

*$NO_X$ Budget source* means a source that includes one or more $NO_X$ Budget units.

*$NO_X$ Budget Trading Program* means a multi-state nitrogen oxides air pollution control and emission reduction program established in accordance with this part and pursuant to § 52.34 or § 52.35 of this chapter, as a means of mitigating the interstate transport of ozone and nitrogen oxides, an ozone precursor.

*$NO_X$ Budget unit* means a unit that is subject to the $NO_X$ Budget Trading Program emissions limitation under § 97.4 or § 97.80.

*Operating* means, with regard to a unit under §§ 97.22(d)(2) and 97.80, having documented heat input for more than 876 hours in the 6 months immediately preceding the submission of an application for an initial $NO_X$ Budget permit under § 97.83(a).

*Operator* means any person who operates, controls, or supervises a $NO_X$ Budget unit, a $NO_X$ Budget source, or unit for which an application for a $NO_X$ Budget opt-in permit under § 97.83 is submitted and not denied or withdrawn and shall include, but not be limited to, any holding company, utility system, or plant manager of such a unit or source.

*Opt-in* means to be elected to become a $NO_X$ Budget unit under the $NO_X$ Budget Trading Program through a final, effective $NO_X$ Budget opt-in permit under subpart I of this part.

*Overdraft account* means the $NO_X$ Allowance Tracking System account, established by the Administrator under subpart F of this part, for each $NO_X$ Budget source where there are two or more $NO_X$ Budget units.

*Owner* means any of the following persons:

(1) Any holder of any portion of the legal or equitable title in a $NO_X$ Budget unit or in a unit for which an application for a $NO_X$ Budget opt-in permit under § 97.83 submitted and not denied or withdrawn; or

(2) Any holder of a leasehold interest in a $NO_X$ Budget unit or in a unit for which an application for a $NO_X$ Budget opt-in permit under § 97.83 is submitted and not denied or withdrawn; or

(3) Any purchaser of power from a $NO_X$ Budget unit or from a unit for which an application for a $NO_X$ Budget opt-in permit under § 97.83 is submitted and not denied or withdrawn under a life-of-the-unit, firm power contractual arrangement. However, unless expressly provided for in a leasehold agreement, owner shall not include a passive lessor, or a person who has an equitable interest through such lessor, whose rental payments are not based, either directly or indirectly, upon the revenues or income from the $NO_X$ Budget unit or the unit for which an application for a $NO_X$ Budget opt-in permit under § 97.83 is submitted and not denied or withdrawn; or

(4) With respect to any general account, any person who has an ownership interest with respect to the $NO_X$ allowances held in the general account and who is subject to the binding agreement for the $NO_X$ authorized account representative to represent that person's ownership interest with respect to $NO_X$ allowances.

*Permitting authority* means the State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to issue or revise permits to meet the requirements of the $NO_X$ Budget Trading Program in accordance with subpart C of this part.

*Receive or receipt of* means, when referring to the permitting authority or the Administrator, to come into possession of a document, information, or correspondence (whether sent in writing or by authorized electronic transmission), as indicated in an official correspondence log, or by a notation made on the document, information, or correspondence, by the permitting authority or the Administrator in the regular course of business.

*Recordation, record, or recorded* means, with regard to $NO_X$ allowances, the movement of $NO_X$ allowances by the Administrator from one $NO_X$ Allowance Tracking System account to another, for purposes of allocation, transfer, or deduction.

*Reference method* means any direct test method of sampling and analyzing for an air pollutant as specified in appendix A of part 60 of this chapter.

*Serial number* means, when referring to $NO_X$ allowances, the unique identification number assigned to each $NO_X$ allowance by the Administrator, under § 97.53(c).

*Source* means any governmental, institutional, commercial, or industrial structure, installation, plant, building, or facility that emits or has the potential to emit any regulated air pollutant under the Clean Air Act. For purposes of section 502(c) of the Clean Air Act, a ''source,'' including a ''source'' with multiple units, shall be considered a single ''facility.''

*State* means one of the 48 contiguous States and the District of Columbia specified in § 52.34 or § 52.35 of this chapter, or any non-federal authority in or including such States or the District of Columbia (including local agencies, and Statewide agencies) or any eligible Indian tribe in an area of such State or the District of Columbia, for which the $NO_X$ Budget Trading Program is promulgated pursuant to § 52.34 or § 52.35 of this chapter.

*Submit or serve* means to send or transmit a document, information, or correspondence to the person specified in accordance with the applicable regulation:

(1) In person;

(2) By United States Postal Service; or

(3) By other means of dispatch or transmission and delivery. Compliance with any ''submission,'' ''service,'' or ''mailing'' deadline shall be determined by the date of dispatch, transmission, or mailing and not the date of receipt.

*Title V operating permit* means a permit issued under title V of the Clean Air Act and part 70 or part 71 of this chapter.

*Title V operating permit regulations* means the regulations that the Administrator has approved or issued as meeting the requirements of title V of the Clean Air Act and part 70 or 71 of this chapter.

*Ton or tonnage* means any ''short ton'' (i.e., 2,000 pounds). For the purpose of determining compliance with the $NO_X$ Budget emissions limitation, total tons for a control period shall be calculated as the sum of all recorded hourly emissions (or the tonnage equivalent of the recorded hourly emissions rates) in accordance with subpart H of this part, with any remaining fraction of a ton equal to or greater than 0.50 ton deemed to equal one ton and any fraction of a ton less than 0.50 ton deemed to equal zero tons.

*Trading program budget* means the total number of $NO_X$ tons apportioned to all $NO_X$ Budget units in a State in